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CASES ON
THE LAW OF THE CONSTITUTION

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CASES ON THE LAW OF THE CONSTITUTION

BY

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OXFORD UNIVERSITY PRESS
HUMPHREY MILFORD
1926

PRINTED IN GREAT BRITAIN BY ROBERT MACLEHOSE AND CO. LTD.
THE UNIVERSITY PRESS, GLASGOW.

PREFACE

I HAVE to thank Mrs. Franklin Richards for her unfailing help and encouragement, Professor J. L. Brierly for his kindness in reading the proofs and for his suggestions, and to acknowledge most gratefully the kindness of the Incorporated Council of Law Reporting for England and Wales, and of the Proprietors of the 'Law Times' for their permission to cite extracts from their various publications.

B. A. B.

LINCOLN'S INN,
December, 1925.

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PART I

PARLIAMENT

I

THE SOVEREIGNTY OF PARLIAMENT

The principal characteristic of the British constitution lies in the sovereignty of Parliament. The King and the two Houses of Parliament together are the supreme power in the State, able to make and unmake the laws and to impose taxes not only in Great Britain itself but throughout the whole Empire. There is no other body or person in the whole of the King's dominions who can overrule the laws it makes, and no Court will fail to give effect to its enactments. To-day its power throughout the length and breadth of this Empire is as unbounded as that of the most autocratic of the Caesars in that of Rome.

The only limitations are those internal and external checks which affect all sovereign bodies however composed. The internal limitation arises from the fact that Parliament consists of persons of the same race, inheriting the same traditions, with the same wishes, as the governed. It cannot act in the same way as the Witenagemót of a thousand years ago; it is the product of different social conditions and can only follow the spirit of the age in which it exists. The influence of the age in which a sovereign lives

cannot fail largely to mould and limit the directions and manner in which power is exercised. The external limitation arises from the fact that all sovereignty must ultimately depend on the will of the governed. Behind the legal sovereign of the State is the political sovereignty of the governed; when the gap between the acts of the one and the wishes of the other becomes too great, the legal sovereign must either bow to the wishes of its political master or give place to a successor.

Parliament did not reach its present position of unquestioned power without a struggle. To-day legislation and taxation are directly beneath its control, and the executive indirectly so. Three rivals have at various times tried to share with Parliament these sovereign powers.

The first was the King, who claimed a right to both make and unmake the laws by Royal Proclamation. In 1610 the judges solemnly declared that proclamations cannot impose any legal obligation, or duty, not already imposed by the common law or Act of Parliament.[1] Notwithstanding this declaration, royal interference with the course of the law was not finally disposed of until the fall of the House of Stuart. While James I. and Charles I. tried to legislate and impose taxes by proclamation, their successors after the Commonwealth endeavoured firstly, by means of the dispensing power,[2] to allow individuals to break the law, and ultimately, by the suspending power, to repeal any law which displeased them.[3] This claim to legislate cost Charles

[1] The Case of Proclamations, I. [2] Godden *v.* Hales, V.
[3] The Seven Bishops Case, VII.

I. his life, and the unrestricted exercise of the dispensing and suspending power cost James II. his throne. The Bill of Rights, 1688, declared illegal both the dispensing and suspending power ; but it is probable that the Crown in fact had had a certain prerogative of dispensing by *non obstante* with Acts of Parliament. The validity of a dispensation from the law, granted by Queen Elizabeth,[1] was accepted as late as 1816.

The fall of the Stuarts saw the final destruction of the claim of the Crown to legislate independently of the two Houses of Parliament.

A second rival to Parliamentary sovereignty arose in the nineteenth century, in the attempt of one House of Parliament to lay down the law by resolution independently both of the other House and the Crown.[2] This claim of the House of Commons to declare the extent and nature of its privileges uncontrolled by the Courts of law did not succeed. Since the Parliament Act, 1911, however, the House of Commons and the Crown together can, in certain circumstances, legislate independently of the House of Lords.

A third rival to the supremacy of Parliament was the electorate. Early in the twentieth century it was alleged that members of the House of Commons were merely trustees for the body by which they were elected and appointed, and were bound to vote in favour of the measures which their electors supported. The electors were alleged to have some legal right to control legislation by controlling their

[1] Case of Eton College, VI.

[2] Stockdale *v.* Hansard, II.

member, this claim too failed.[1] The sole legal right of the electors was held to be to select members of Parliament; and these latter once elected are independent advisers of the Crown.

The two Houses of Parliament together with the Crown still form a sovereign body, powerless to legislate individually (except under the provisions of the Parliament Act, 1911) and not bound, in the case of the House of Commons, by any trust in favour of their electorate.

The right to tax has been declared since *Magna Carta* to be solely exercisable by Parliament. It has been constantly claimed by the Crown,[2] and in more recent times by the House of Commons,[3] but since the Bill of Rights no taxes have been successfully imposed except by parliamentary authority.

Parliament thus directly controls taxation and legislation. The executive power is indirectly beneath its control in that, though it is vested by common law and statute in the Crown and particular offices of State and Government departments, it is only exercised by ministers dependent on Parliament.

THE CROWN AS LEGISLATOR

I. *The Case of Proclamations*

1610 **12 Rep. 74**

James I. by proclamation had forbidden the erection of new buildings in London, and the making of starch from wheat. The House of Commons pro-

[1] Osborne *v.* The Amalgamated Society of Railway Servants, III.
[2] Rex *v.* Hampden, X. [3] Bowles *v.* The Bank of England, XI.

tested against this form of legislation as being contrary to law. The King submitted the question of the validity of the proclamations to Lord Coke, who consulted with the judges ; and at a conference between the Privy Council and the judges it was decided that :

> " The King cannot by his proclamation create any offence which was not an offence before, for then he may alter the law of the land by his proclamation upon a high point ; for then he may create an offence where none is, upon that ensues fine and imprisonment : also the law of England is divided into three parts, Common law, Statute law, and Custom ; but the King's proclamation is none of them."

Further the judges resolved that :

> " The King had no prerogative, but that which the law of the land allows him, and that if an offence be not punishable in the Star Chamber the prohibition of it by a proclamation cannot make it punishable there."

THE HOUSE OF COMMONS AS LEGISLATOR

II. *Stockdale* v. *Hansard*

1839 **9 A. & E. 1**

The plaintiff claimed £5000 damages for a libel published by the defendant. The libel was contained in a report laid before the House of Commons. The Commons ordered that the report should be printed, and, in accordance with a previous resolution, sold to the public at specified rates. The defendant was employed by the House. He printed and sold the report in accordance with the order.

After proceedings had been begun against the

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defendant for the libel contained in this report, the House of Commons passed a resolution that :

> " the power of publishing such of its reports, votes, and proceedings as it shall deem necessary or conducive to the public interest, is an essential incident to the constitutional functions of Parliament, more especially to the Commons' House of Parliament as the representative portion of it."

The matter published was undoubtedly libellous, but the defendants pleaded that the publication was made by order of the House of Commons and that such an order made the publication privileged.

The plaintiff demurred, on the ground that the known and established laws of the land cannot be superseded, suspended, or altered by any order or resolution of the House of Commons : that the House of Commons in Parliament assembled cannot by any resolution or order of themselves create any new privilege to themselves inconsistent with the known laws of the land, for if such power be assumed by them there can be no reasonable security for the life, liberty, property or character of the subjects of this realm.

The defence was based on two points : firstly, it was claimed that the alleged grievance arose from an act done by the House of Commons in the exercise of a privilege claimed by them. The question of privilege therefore arose directly, and the Court could not inquire into the existence of the privilege but must give judgment for the defendants. Secondly, the defendants alleged that there existed a privilege in the House of Commons to authorise the publication of their proceedings and reports.

The judges, Lord Denman, C.J., Littledale, J., Patteson, J., and Coleridge, J., held unanimously that the defence pleaded was no defence in law and gave judgment for the plaintiff.

In the course of the judgments it was said :

" This is a claim for an arbitrary power to authorise the commission of any act whatever, on behalf of a body which in the same argument is admitted not to be the supreme power in the State. The supremacy of Parliament, the foundation on which the claim is made to rest, appears completely to overthrow it, because the House of Commons is not Parliament, but only a co-ordinate and component part of Parliament. That sovereign power can make and unmake the laws ; but the concurrence of the three legislative estates is necessary ; the resolution of any one of them cannot alter the law or place any one beyond its control. . . . "

" It is alleged that each House of Parliament is the sole judge of its own privileges. No practical difference can be drawn between this right to sanction all things under the name of privilege and the right to sanction all things whatever by merely ordering them to be done.

" The power to make new privileges was expressly disclaimed, the House only claiming to act judicially in declaring the law of Parliament. There is, however, no reasonable doubt that it has been the practice of the Courts to inquire into questions of privilege.

" Every Court, in which an action is brought upon a subject matter generally and *prima facie* within its jurisdiction, where the powers, privileges, and jurisdictions of any other Court come into question, must of necessity determine as to the extent of these powers and the jurisdiction of the Court whose powers are brought into question.

" In the present case, upon principle and authority, this Court is not precluded by the resolution of the House

of Commons from inquiring into the legality of the Act complained of."

The Court further found that the right of publishing had never been one of the privileges of the Houses of Parliament.[1]

Judgment for the plaintiff.

THE ELECTORATE AS LEGISLATOR

III. *The Amalgamated Society of Railway Servants* v. *Osborne*

1910 **(1910) A.C. 87**

Osborne was a member of the defendant Trade Union. This Society had under its rules levied forced contributions from the plaintiff and its other members for the payment of salaries or maintenance allowances to members of Parliament. The members of Parliament who received this payment were pledged to observe and fulfil the conditions imposed by the constitution of the Labour party and be subject to their "Whip." Osborne applied to the Court for a declaration that those forced levies by the Society were *ultra vires* and void. The Court of Appeal held that he was entitled to this declaration. The Society appealed.

Lord Shaw of Dumfermline in his judgment in the House of Lords said :

> "The objects for which such contributions are imposed must, if this Court is to reverse the decision of the Court below, be firstly, within the expressed or implied scope of the objects of the Union, and secondly, within the law; that is to say, for purposes which are not of themselves illegal, unconstitutional or contrary to public policy."

[1] See Chapter II., p. 33.

His Lordship did not deal with the first point; with regard to the second he said:

"In brief my opinion is that the rule of the Society that, 'all candidates shall sign and respect the conditions of the Labour party and be subject to their 'Whip,'' the rule that candidates are to be 'responsible to and paid by the Society,' and, in particular, the provision in the constitution of the Labour party that, 'candidates and members must accept this constitution, and agree to abide by the decision of the Parliamentary party in carrying out the aims of this constitution,' are all fundamentally illegal, because they are in violation of the sound public policy which is essential to the working of representative government.

"Parliament is summoned by the Sovereign to advise His Majesty freely. By the nature of the case it is implied that coercion, restraint or a money payment, which is the price of voting at the bidding of others, destroys and imperils that function of freedom of advice which is fundamental in the very constitution of Parliament. *Inter alia*, the Labour party pledge is such a price with its accompaniments of unconstitutional and illegal constraint and temptation. . . .

"Further the pledge is an unconstitutional and unwarrantable interference with the rights of the constituencies of the United Kingdom. . . . It is a fundamental rule that the electors are to be free from coercion, constraint, or corrupt influence; and it is they, acting through their majority, and not any outside body having money power, that are charged with the election of a representative. . . . Further, in regard to the member of Parliament himself, he, too, is to be free; he is not the paid mandatory of any man or any organisation of men, nor is he entitled to bind himself to subordinate his opinion on public questions to others, for wages, or at the peril of pecuniary loss; and any contract of this character

would not be recognised by a Court of law, either for its enforcement or for its breach."

Order of the Court of Appeal affirmed.

THE DISPENSING POWER

IV. *Thomas* v. *Sorrell*

1674 **Vaughan 330**

The plaintiff sought to recover from the defendant various sums of money alleged to be due as fines for selling wine without a licence. By a statute of 7 Ed. VI., c. 5, the sale of wine without a licence was forbidden, and a fine of five pounds was imposed for every such offence; but when James I. by letters patent incorporated the Vintners' Company he gave it and its freemen the right to sell wine *non obstante* the statute of 7 Ed. VI., c. 5. A statute 12 Car. II., reaffirmed the statute of 7 Ed. VI., but with a clause saving the rights of the Vintners' Company. It was proved that the defendant sold wine without a licence. The defendant pleaded that as a freeman of the Vintners' Company he was entitled to do so. The case then turned on whether the King could dispense with 7 Ed. VI. so as to allow the Vintners' Company and its freemen to sell wine without a licence.

The case was considered at great length by Vaughan, C.J., whose judgment is obscure, and shows that the exact state of the law as to the exercise of the dispensing power was unsettled and the principles applicable to it unknown. Vaughan accepted the fact that the Crown had a certain dispensing power, but he did not show with any decision when

the power was exercisable and when it was not. He rejected the old theory that the King had a dispensing power over *malum prohibitum* by statute, but not over *malum per se*; for, as he pointed out, unless an act were *malum prohibitum* the law took no cognisance of it and it was not in fact illegal. It was not every *malum prohibitum* by statute which could be dispensed with by the King. The general principle laid down is that the Crown had no power to dispense with any general penal law, but that the King might dispense with an individual breach of a penal statute by which no man was injured, or with the continuous breach of a penal statute enacted for the Crown's personal benefit. "For," in Vaughan's own words, "The King can in no case dispense but with his own right and not with another's."

In this case, it was held that the King had power to dispense with 7 Ed. VI., as by so doing he did not destroy the object of the statute, which was to regulate rather than to stop the sale of wines, and as the fine went to the Crown, its remission did not affect third parties.

Judgment for the defendant.

V. *Godden* v. *Hales*

1686 **2 Showers 475**

The plaintiff sued the defendant for the penalties imposed by 25 Car. II., c. 2, on persons holding certain offices without taking the oath of supremacy and allegiance, and subscribing the required declaration.

The defendant had accepted such an office, that

of colonel, but had neither taken the oath nor subscribed the declaration. The defendant pleaded that after his admission the King by his letters patent had pardoned, released, and *dispensed* with the said oaths, etc.

The question at issue was whether such a dispensation was a good bar to the action. 25 Car. II., c. 2, was an Act of Parliament of public concern and designed to protect the Church of England. James II. was claiming to grant a dispensation for a continuous breach of a penal statute. The case was argued in the King's Bench and the opinions of all the judges were taken; eleven out of twelve gave judgment in favour of the King's right to dispense with the Act.

The Lord Chief Justice went so far in his judgment as to say that: the laws were the King's laws; that the King had a power to dispense with any of the laws of Government as he saw necessity for it; that he was sole judge of that necessity; and that no Act of Parliament could take away that power.

(This claim of the Crown to exercise a dispensing power over the laws, or some part of them, was abolished by the Bill of Rights (1 Wm. and Mary, Sess. 2, c. 2) which declared and enacted that:

1. "The pretended power of dispensing with laws, or the execution of laws, by regal authority, as it hath been assumed and exercised of late, is illegal."

2. "From and after the present session of Parliament no dispensation by *non obstante* of or to any statute, or any part thereof, shall be allowed, but that the same shall be held void and of no effect, except a dispensation be allowed of in such statute.")

VI. *King's College, Cambridge*, v. *Eton College*

1816 **Report, Philip Williams, 1816**

Eton College and King's College, Cambridge, were intimately linked by their founder Henry VI., and were for some purposes treated as one foundation. Under the statute governing Eton the Fellows were forbidden to hold ecclesiastical preferment; this statute had been observed for the first hundred years after the foundation of the College, but Queen Elizabeth gave a dispensation to the Fellows relieving them from this restriction. This dispensation provided that the Fellows might receive and enjoy any benefice, any statutes of the College notwithstanding. Since the reign of Elizabeth the Fellows of Eton College had been for the most part beneficed clergymen. The Provost and Fellows of King's College complained of this, on the ground that as both the Fellowships of Eton and the livings under the patronage of Eton were filled from members of King's College next after Etonians themselves, this custom decreased the number of livings open to King's College; and alleged that the dispensation under which the livings were held was illegal. The complaint was heard by the Visitor of the College and two assessors.

The case turned on the validity of the dispensation of Queen Elizabeth, which King's College declared was illegal. It was alleged that the Bill of Rights was a declaratory Act, and that the exercise of dispensing power by the Crown had always been illegal. Eton College argued that the dispensing power was possessed by the Crown at common

law, and was universally recognised, the universities and colleges alike submitting to it and fresh statutes made by the Crown. The abusive exercise of the prerogative neither disproved its legal origin or existence. The Bill of Rights, while abolishing the power of dispensing with Acts of Parliament, recognised its existence in the past. The Bill was not designed to affect previous transactions ; a dispensation over 100 years old could not be regarded as an instance of the prerogative " as of late exercised," and must be treated as valid.

HELD : that the Fellows of Eton College were entitled to hold one benefice each by virtue of the dispensation of Queen Elizabeth.

THE SUSPENDING POWER

VII. *The Case of the Seven Bishops*

1688 **12 St. Tr. 183**

In the reign of James II. various penal laws were in existence affecting persons who were not members of the Church of England. On the 4th April, 1687, James II. issued a declaration that these laws were not to be put into execution. The King declared that from thenceforth the execution of all penal laws in matters ecclesiastical, or for non-conformity to the religion established, should be immediately suspended. Further that it was his royal will and pleasure that the oaths of supremacy and allegiance, also the several tests and declarations set forth in Acts of Parliament made in the reign of Charles II., should not be required of any person who should be employed in any office under the Government.

On April 27th, 1688, this declaration was re-issued, and by an Order in Council was ordered to be read in all the churches, and the Bishops were required to distribute the declaration through their dioceses.

The Archbishop of Canterbury and six Bishops drew up a petition to the King which they presented to him. In the petition they declared that they had great averseness to the distributing and publishing in the churches of His Majesty's declaration of liberty of conscience, especially from the consideration that the declaration was founded upon such a dispensing power as had often been declared illegal in Parliament.

Further, "your petitioners most humbly and earnestly beseech your Majesty that you will be graciously pleased not to insist upon their distributing and reading your Majesty's declaration."

The King, infuriated by this opposition, committed the seven Bishops to the Tower of London, and they were brought up before the King's Bench upon an information by the Attorney-General, for having published a false, malicious, and seditious libel.

The Bishops' defence was based on three points: firstly, as the guardians of the Church they claimed to be bound, both in conscience and by statute, to take care of the Church. Secondly, they claimed that the petition was presented with all the humility and decency that could be, and that as there was no ill-intent, to deliver a petition could not be a fault, as it was the right of every subject to petition. Thirdly, they contended that the fact alleged in the petition was true. This power of dispensation

having been considered in Parliament—upon debate had been declared to be contrary to law. Such a power to dispense with and suspend the law could not be with any reason. To dispense with a law must argue a power greater than, or at least as great as, that which made the law. The petition could not be designed to diminish the prerogative, as the King had no such prerogative.

The jury returned a verdict of not guilty.

(This case is an authority on the suspending power and on the right of the subject to petition. The prerogative of suspending the law was finally abolished by the Bill of Rights, which declared that : " the pretended power of suspending of laws, or the execution of laws, by regal authority, without consent of Parliament, is illegal."

The right of the subject to petition, which had been exercised since the reign of Edward I., and was recognised by *Magna Carta*, was also dealt with in the Bill of Rights, which declares that : " it is the right of the subjects to petition the King ; and all commitments and prosecutions for such petitioning are illegal.")

PARLIAMENTARY CONTROL OVER TAXATION

VIII. *Darnel's Case* (*The Five Knights' Case*).

1627 **3 St. Tr. 1**

Charles I., being in need of money, and at the same time a grant from Parliament being unobtainable, resolved to raise money by forced loans. Commissioners were dispatched to assess and collect the loan. They were instructed to make a return of

the names of all persons refusing to pay. These were bound over to tender their appearance before the Council Board and many of them were committed to prison. Amongst those who were imprisoned were Sir Thomas Darnel and four other knights.

Darnel, by his counsel, moved the justices of the King's Bench to grant him a writ of *habeas corpus*, directed to the warders of the Fleet, to show the cause of his imprisonment. The writ was granted, and the Attorney-General ordered the warders of the Fleet to return that: Sir Thomas Darnel was detained by His Majesty's special command, signified by the Lords of the Privy Council.

It was argued that this return was bad in form and bad in substance. It was alleged to be insufficient in substance because there ought to be a cause of imprisonment assigned. The writ of *habeas corpus* was the only means the subject had for obtaining his liberty; the object of the writ being to return the cause of the imprisonment, that it might be examined whether the parties ought to be discharged or not: which, however, could not be done upon this return, for the cause of imprisonment was not expressed at all. If this return were held good, then this imprisonment would continue not for a time only but for ever, and the subjects of the kingdom might be restrained of their liberties perpetually without remedy by law. Therefore this return could not stand with the laws of the land nor with *Magna Carta*, which laid down that no freeman shall be taken or imprisoned but by the lawful judgment of his peers.

Hyde, C.J., gave judgment for the Crown, holding

that the return to the writ was sufficient. The five knights were remanded to prison.

(When Parliament met in 1627 Darnel's case was violently discussed by the House of Commons, which passed a series of resolutions condemning the imprisonment, the form of the writ, and the judgment. The resolutions were forwarded to the Lords, and a conference between the two Houses took place. The result of the conference was the Petition of Right, which with regard to the liberty of the subject recites and prays as follows :

" Whereas by the statute called ' The Great Charter of the Liberties of England ' it is enacted that no freeman may be taken or imprisoned or in any way destroyed, but by the lawful judgment of his peers, or by the law of the land.

" And in the reign of Edward III. it was enacted by Parliament that no man should be put out of his land, nor imprisoned, nor disinherited, nor put to death, without being brought to answer by due process of law.

" Nevertheless against the tenor of these statutes, divers of your subjects have been imprisoned without any cause shown ; and when for their deliverance they were brought before your justices, by your Majesty's writs of *habeas corpus*, there to undergo and receive as the Court should order, and their keepers commanded to certify the causes of their detainer ; no cause was certified, but that they were detained by your Majesty's special command, signified by the Lords of your Privy Council, and yet were returned back to several prisons without being charged with anything to which they might answer according to law.

" They do therefore humbly pray your Most Excellent Majesty that no freeman in such manner as is before mentioned, be imprisoned or detained."

To this petition the King ultimately assented.)

IX. *Bates' Case*

1606 **2 St. Tr. 371**

An information was exhibited in the Court of Exchequer against Bates, a merchant, for refusing to pay a duty of 5s. on every hundred of currants he imported. This duty of 5s. had been imposed by the King by letters patent. Bates' defence was that the poundage imposed by statute on a hundred of currants was only 2s. 6d., and he therefore refused to pay the tax of 5s. as it was imposed unjustly, unduly, and against the law of the land.

The argument for the defence was based on three points. Firstly, the common law required that all the royal revenues should be reducible to a certainty, and that any change in the established rate must be by grant from Parliament. Secondly, from the Conquest until the reign of Queen Mary only six impositions resembling the tax on currants had been imposed by the Crown, and each of these was a subject of protest by the House of Commons. Thirdly, even if the King at common law had power to impose such taxes, the power had been expressly taken away by various statutes, the principal being *Magna Carta*.

Judgment was given in the Exchequer for the Crown.

(On Parliament meeting in 1610 the Petition of Grievances was addressed to King James I. In it the Commons said :

> " The policy and constitution of this your kingdom appropriates unto the Kings of this realm with the assent of Parliament, as well the sovereign power of making

laws, as that of taking or imposing upon the subjects' goods or merchandizes, wherein they have justly such a property as may not without their consent be altered or exchanged."

The House of Commons then petitioned that:

" all impositions set without the assent of Parliament may be quite abolished and taken away and that your Majesty, in imitation of your noble progenitors, will be pleased, that a law may be made during this session of Parliament to declare that all impositions set, or to be set upon your people, their goods and merchandizes, save only by common assent in Parliament, are and shall be void.")

X. *Rex* v. *Hampden*

1637 **3 St. Tr. 825**

In 1634 Charles I. issued writs for ship-money to the maritime towns. In 1635 he issued writs to the Sheriffs of the inland towns, requiring them to assess and levy from all persons, according to their estate, ship-money, and to imprison all those who refused to pay.

To determine on the legality of the writ the King privately consulted the judges; who gave it as their opinion that, when the good and safety of the kingdom in general was concerned, and the whole kingdom in danger, His Majesty might, by writ under the Great Seal, command all the subjects of the kingdom at their charge to furnish ships munitions and victuals for such time as His Majesty should think fit, for the defence and safeguard of the kingdom from such danger and peril; and by law His Majesty might compel the delivery thereof, in case of refusal or refractoriness. Further, that

in such a case His Majesty was the sole judge both of the danger and when and how the same was to be prevented and avoided.

The Sheriff of Bucks assessed the tax on Hampden at 20s. Hampden refused to pay, and proceedings were taken against him in the Exchequer. He demurred to the writ as insufficient in law.

Mr. St. John argued the case for Hampden. He admitted that every man by his allegiance was bound to contribute to the defence of the realm in time of danger, and, too, that His Majesty was sole judge of dangers from abroad and how the same were to be prevented. So the question was not who had the supreme power of issuing the writ, for that power was admitted to be in the King, but only *de modo*, by what method this supreme power was to be applied.

The forms and rules of law had not been applied in this case. For as, without the assistance of his judges, His Majesty applied not his laws, so neither, without the assistance of his great Council in Parliament, could he impose taxes. This writ, giving power to sell and alter the property in the defendant's goods, did not issue from His Majesty sitting in Parliament. The question was whether it was erroneously issued or not.

The law had provided undoubted means for the defence of the realm by land and sea. The first was by tenure of land, and the service thereby due. The second was by prerogatives settled on the Crown for the defence of the kingdom. The third was by supplies of money for the defence of the sea in times of danger. If these ordinary sources of revenue were insufficient

the law provided the King another means of raising supplies. Parliament was appointed as the means of supply upon extraordinary occasions. That extra aids could not be raised without the consent of Parliament appeared from the aids asked by former Kings from Parliament for the defence of the country. For the prince would not ask as a gift for that which he might or ought to have of right. That extraordinary taxation cannot be imposed by the King alone was clearly laid down in the following statutes: The Charters of William I, *Magna Carta*, *De Tallagio non concedendo*, and the Petition of Right.

Seven judges against five gave judgment for the King.

Finch, C.J., in his judgment said:

"My reasons that the King may thus charge his subjects to join with him in the defence of his Kingdom are these: (1) The defence of the Kingdom must be at the charge of the whole Kingdom in general; (2) the power of laying this charge is by the policy and fundamental laws of this Kingdom solely vested in the King; (3) the law that hath given this power to the King, hath given him the means to exercise it.

"It has been objected that there is a means provided by Parliament, which will not withhold aid for the defence of the Kingdom in time of danger. But, though I hold Parliaments are an excellent means for raising aid for the defence of the Kingdom, yet they are not the only means, for then Parliament, and not the King, would be the only judge and have the defence of the realm; or else it would give the King the charge of defence without power or means.

"Acts of Parliament may take away flowers and ornaments of the Crown, but not the Crown itself; they cannot bar a succession; nor can our Kings be attainted

by them, and Acts that bar them of possession are void. No Act of Parliament can bar a King of his regality ; or bar him of the allegiance of his subjects ; therefore Acts of Parliament to take away his royal power in the defence of his Kingdom are void."

(The judgment in this case gave much offence to the nation ; and when Parliament met an Act was passed declaring that the charge imposed upon the subject, known as ship-money, and the judgment against Hampden were contrary to the laws of the Realm. The statute further prayed that the Petition of Right should be put in execution, and that the judgment against Hampden should be vacated and cancelled.

Further the statute 16 Car. I., c. 8 granting tonnage and poundage to the King declared that : " no charge whatsoever may be made or imposed on any merchandise, exported or imported, without common consent in Parliament."

The principle of Parliamentary control over taxation was re-affirmed, and finally established by the Bill of Rights, which declared that :

" Levying money for or to the use of the Crown by pretence of the prerogative without grant of Parliament for longer time or in other manner than the same is or shall be granted is illegal.")

XI. *Bowles* v. *Bank of England*

1913 **(1913.) C.H. 57**

The plaintiff purchased £65,500 of stock, which was transferred into his name in the Bank of England. A dividend of £900 was payable on the 1st July. On April 2nd, 1912, the House of Commons'

Committee for Ways and Means passed a resolution approving of the imposition for the financial year commencing April 6th, 1912, of Income Tax at the rate of 1s. 2d. in the pound, this decision was reported to and adopted by the House of Commons on June 24th, 1912. Income Tax is imposed by statute annually, and lapses at the end of the financial year, when it is re-imposed at the old or a new rate. On July 1st, 1912, the defendants paid the plaintiff £848, being the dividend of £900 less £52, being Income Tax at 1s. 2d.

The plaintiff claimed

> "a declaration that the defendants, their servants or agents, are not entitled to deduct by way of Income Tax any sum whatsoever from any dividend or interest payable by them upon the public funds or the said public stock before such tax is actually imposed by Act of Parliament,"

and also made a claim for repayment of the £52, the amount of tax deducted.

The defendants firstly denied that the amount deducted was payable to the plaintiff, and contended that a resolution of the Committee of Ways and Means was sufficient authority for the Bank to make the deduction. Secondly, the defendants pleaded that since the imposition of Income Tax in 1842, the defendants had been accustomed to treat such resolutions as sufficient authority to deduct Income Tax in respect of interest on Government stocks becoming payable after the passage of such resolution of the Committee of Ways and Means or of the House and before the passing of the Act of Parliament carrying out such resolutions; and that the

plaintiff was well aware of the practice and bought the stock on the terms that deduction of the tax would be made in these circumstances.

The plaintiff's case was based on *Magna Carta* and the Bill of Rights, which provides that :

" levying money for or to the use of the Crown by pretence of the prerogative and without grant of Parliament or for longer time or in other manner than the same is or shall be granted is illegal."

Parker, J., in his judgment said :

" the question is whether a resolution of the Committee of the House of Commons for Ways and Means, either alone or when adopted by the House, authorises the Crown to levy on the subject an Income Tax assented to by each resolution but not yet authorised by Act of Parliament.

" By 1. W. and M. known as the Bill of Rights it was finally settled that there would be no taxation in this country except under authority of an Act of Parliament. The Bill of Rights remains unrepealed, and no practice or custom however prolonged, or however acquiesced in on the part of the subject, can be relied upon by the Crown as justifying any infringement of its provisions.

" It follows that with regard to the powers of the Crown to levy taxation, no resolution either of the Committee of Ways and Means or of the House itself has any legal effect whatever. Such resolutions are necessitated by a Parliamentary procedure adopted with a view to the protection of the subject, and it would be strange to find them relied on by the Crown in levying a tax before such tax is actually imposed by Act of Parliament."

Judgment for the plaintiff.

XII. *Brocklebank Limited* v. *The King*

1925 **(1925) 1 K.B. 52**

This was an appeal by the Crown from a judgment of Avory, J., in favour of the suppliants on the trial of a Petition of Right.

The suppliants were shipowners, and in 1919 they desired to sell four ships to foreign buyers. At that date such a sale could not be carried out without the licence of the Shipping Controller. They applied for a licence and were given one on condition that 15 per cent. of the purchase price was paid to the Exchequer. The sale was carried out and the sum paid under protest. The Shipping Controller, in exacting the payment as a condition of his consent, purported to act under Reg. 39 C.C. of the Defence of the Realm Regulations, which forbade the purchase of ships without his consent.

The suppliants then presented a Petition of Right, whereby they prayed: (1) A declaration that the Shipping Controller was not entitled to demand payment of any sum as a condition of granting permission for the sale to a foreign owner of a British ship. (2) The payment to them of the sum of £34,920 paid.

The Attorney-General, on behalf of the Crown, demurred, on the ground that by reason of the Indemnity Act, 1920, the Court had no jurisdiction to entertain the claim.

The suppliants based their argument largely on the case of the *Attorney-General* v. *Wilts United Dairies*.[1] In that case the Food Controller had

[1] (1921) 37 L.T.R. 884. (1922) 38 L.T.R. 781.

exacted, as a condition of granting a licence to a Dairy Company to purchase milk, an undertaking by the Company to pay him 2d. per gallon on milk purchased under the licence. On an information to recover moneys payable under that undertaking, it was held by the House of Lords that the claim could not be supported, for the imposition of the charge could only be properly described as a tax, which could only be levied under statutory authority.

HELD: Firstly that, the demand of a payment to the Crown as a condition of granting a licence was, on the authority of *Wilts United Dairy Case*, "levying money for the use of the Crown without grant of Parliament," contrary to the Bill of Rights and therefore illegal.

HELD: Secondly that, the Indemnity Act, 1920, which laid down that: "no action or other legal proceedings shall be instituted in any Court of Law for or in respect of any act, matter, or thing done" by an official of the Crown in good faith and in intended execution of his duty, was a bar to the claim.

Appeal allowed.

II

THE PRIVILEGES OF PARLIAMENT

Both Houses of Parliament enjoy various privileges for the maintenance of their dignity, independence, and authority, and their members individually have further privileges for the protection of their persons and to enable them to perform their duties freely and independently.

These privileges are uncertain and vague, a few only have been defined by statute or judicial decision; for the most part they rest solely upon the law and custom of Parliament, having developed through centuries. For long the guiding principle of their growth was the maintenance of the independence of the two Houses as against the Crown. In this contest the two Houses have been successful, but when in later days an endeavour was made to extend the privileges still further, regardless of private rights, the attempt failed owing to the refusal of the Courts to admit this arbitrary claim.[1]

Since the reign of Henry VIII., at the beginning of each Parliament, the Speaker of the House of Commons has asked the sovereign "for their ancient and undoubted rights and privileges; particularly

[1] Stockdale *v.* Hansard, II.

that their persons may be free from arrests and all molestations ; that they may enjoy liberty of speech in all their debates ; may have access to His Majesty's royal person whenever occasion shall require ; and that all their proceedings may receive from His Majesty the most favourable construction."

The right of freedom of access to the sovereign is enjoyed by the House of Commons as a body, and also by the House of Lords ; in addition, the Peers, as hereditary Counsellors of the Crown, are entitled individually to have an audience of the sovereign.

The claim made by the Speaker to have the most favourable construction placed upon all the proceedings of the House, is not really a request for a privilege but for the exercise of a rule of conduct conducive to the cordial co-operation of the several branches of the legislature.

The two most important privileges claimed by the House are the right of members to freedom from arrest and freedom of speech.

The right of freedom from arrest is a common law right which dates from the very beginning of parliamentary history, though it is in part regulated by various statutes. An Act of James I. (1 Jas. I., c. 13), while recognising the privilege, provides that, after the privilege of the session has expired, parties may sue forth and execute a new writ. Another statute (the Parliamentary Privileges Act, 1770) took indirectly from members' servants this privilege of freedom from arrest, for such servants at common law enjoyed the same immunity as their masters. It also provided that an action might be brought at any

time against members, and no process thereupon was to be stayed by reason of privilege, only the person of a member was privileged from arrest. A member is free from arrest for forty days before the meeting of Parliament and for a similar period after its prorogation,[1] in respect of all civil actions but not in respect of any indictable offence, or attachment for contempt of Court.

Freedom of speech, the second privilege claimed, is also of very early origin, but, owing to various conflicts with the Crown, the privilege has been recognised and confirmed by statute. The first (4 Hen. VIII., c. 8), known as Strode's Act, lays down the general right of members to freedom of speech in Parliament. The right was questioned for the last time by Charles I.,[2] who obtained in 1629 a verdict against the House of Commons, which was ultimately reversed in 1668 by the House of Lords. The Bill of Rights reaffirmed the privilege and declared that: "the freedom of speech and debates or proceedings in Parliament, ought not to be impeached or questioned in any Court or place out of Parliament."

Members only enjoy this right of freedom of speech in the House itself; they possess no such protection for statements made outside its walls, and for these they are as liable as the ordinary citizen.[3] A *bona fide* and accurate report of speeches made in either House is privileged on the same grounds that reports of judicial proceedings are privileged,[4] and this privilege has been extended to

[1] Goudy *v.* Duncombe, XIII.
[2] Rex *v.* Sir John Elliot, XV.
[3] Rex *v.* Lord Abingdon, XVI.
[4] Wason *v.* Walter, XXVIII.

cover papers published by Parliamentary authority[1] (Parliamentary Papers Act, 1840).

Both Houses possess many other privileges which are not specifically claimed by the Speaker from the King; such as the right to exclude strangers from the House, to prohibit any report of their proceedings, etc. These privileges of Parliament, resting as they sometimes do entirely on customary law, are vague and ill-defined; but even though this is so, they make a body of law which cannot be expanded by the two Houses jointly or separately.[1] No new privilege can be created except by statute. This position is complicated by the fact that each House has the exclusive right to regulate its own proceedings, and to be the sole and exclusive judge of its own privileges within its walls,[2] but this does not give power to lay down the law outside the House, or to trench upon private rights. In this latter case the Courts have jurisdiction to investigate the matter, and neither House can by resolution oust this right. The relationship of the Houses to the Courts is one of extreme nicety. The privileges of Parliament designed for the protection of the dignity and authority of the two Houses, and to enable them to perform their duties, are not lightly to be questioned; but as at various times an attempt has been made to use these privileges for the oppression of the subject, it is no less necessary that they should not be extended beyond the purpose for which they exist to the detriment of private rights. On the Courts fall the duty of reconciling these two principles.[2]

Both Houses have power to enforce their privileges

[1] Stockdale *v.* Hansard, II. [2] Bradlaugh *v.* Gossett, XXII.

by commitment. The House of Commons can only commit for the duration of the session, the House of Lords can commit for a definite period.[1] This right of commitment is largely withdrawn from the supervision of the Courts, owing to the fact that the grounds on which the power is exercised need not appear on the warrant.[2] Hence the Court cannot decide on the merits of the case.

FREEDOM FROM ARREST

XIII. *Goudy* v. *Duncombe*

1847 **1 Exch. 430**

The defendant, a member of the House of Commons, had been arrested for default in payment of a debt secured by a judge's order. A summons was taken out for his discharge on the ground that he was privileged from arrest. Parliament was dissolved on the 23rd July, 1847, and writs were issued returnable for a fresh election on the 21st September. This arrest took place on the 2nd September, an interval of less than twenty days before the meeting of the new Parliament.

HELD: Firstly, that the privileges, which belong to members of Parliament between a prorogation and the next meeting of Parliament, belong to them before they assemble upon a summons after a dissolution. Secondly, that whether the privilege of a member of Parliament to be free from arrest before or after the meeting of Parliament was originally for a convenient time or a time certain; the period of forty days before and after the meeting of Parliament

[1] Lord Shaftsbury's Case, XIX. [2] Howard *v.* Gossett, XXIV.

had for about two centuries at least been considered either a convenient time or the actual time allowed. Such had been the usage, and such was the law.

XIV. *In Re The Anglo-French Co-operative Society*
1880 **14 Ch. D. 533**

The Anglo-French Co-operative Society was in course of liquidation, and an order was made, at the instance of the liquidator, that Mr. J. F. Harrison should deliver up certain property in his possession within fourteen days from the 24th of February. Mr. J. F. Harrison was a member of the Parliament which was dissolved on the 24th of March. On the 24th of March a motion was made on the part of the liquidator to commit Mr. Harrison for not complying with the order of the Court. The motion was refused on the ground that Mr. Harrison was a member of the House of Commons and protected from arrest. A renewed notice of motion for the same purpose came on for hearing on the 15th of April, on the ground that Mr. Harrison was no longer a member of Parliament and was not a candidate for any constituency.

HELD : that the rule laid down in *Goudy* v. *Duncombe* applied, and that a member of Parliament was entitled to privilege from arrest for forty days both after and before the meeting of Parliament, and whether after a prorogation or a dissolution ; and that the rule applied to a person who was a member of the old, but was not a member of the new, Parliament.

The notice of motion was irregularly given and must be refused.

FREEDOM OF SPEECH

XV. *Rex* v. *Sir John Elliot, Denzil Hollis, and Benjamin Valentine*

1629 **3 St. Tr. 130**

In 1629 the Attorney-General exhibited an information in the King's Bench against Elliot, Hollis, and Valentine, three members of Parliament, charging them, firstly, with making seditious speeches publicly and maliciously in the House of Commons, and secondly, with laying violent hands upon the Speaker, to the great affrightment and disturbance of the House, in order to prevent him leaving the chair.

The defendants put in a plea to the jurisdiction of the Court ; " because these offences are supposed to be done in Parliament and ought not to be punished in this Court, or in any other, but in Parliament."

The point was argued at considerable length, and the judges held unanimously that the Court of King's Bench had jurisdiction, though the offences were committed in Parliament, and that the members must answer the charge. The case was then tried and the defendants were imprisoned, during the King's pleasure, and were heavily fined.

(When Parliament met in 1640 this decision of the King's Bench was debated, and a series of resolutions were passed by the House of Commons affirming, firstly, that the committing of Elliot and the rest to prison during the Parliament was a breach of the privileges of Parliament ; secondly, that the exhibiting of the information in the King's Bench against the three, being members of Parliament, for matters done in Parliament, was a breach of the

privileges of Parliament. The Commons then proceeded to grant damages to the defendants for the losses and damages sustained.

In 1667 the case was again re-opened by the House of Commons, and now a distinction was drawn between the two charges ; the first which turns on the right of members to freedom of speech in Parliament, and the second which involves the still unsettled question as to the jurisdiction of the ordinary Courts over crimes committed within the walls of Parliament. The House of Commons passed two resolutions. The first resolved that : " The Act of Parliament of 4 Hen. VIII., c. 8, commonly entitled an Act concerning Richard Strode, is a general law extending to indemnify all and every the members of both Houses of Parliament, in all Parliaments, for and touching any Bills speaking, reasoning, or declaring of any matter or matters in and concerning the Parliament, to be communed and treated of ; and is a declaration of law of the ancient and necessary rights and privileges of Parliament." The second declared that : " the judgment given against Elliot, Hollis, and Valentine, in the King's Bench, was an illegal judgment and against the freedom and privilege of Parliament."

In 1668 Denzil Hollis brought the case before the House of Lords upon a Writ of Error. The decision of the King's Bench was reversed.

This final verdict established the privilege of freedom of speech for members of Parliament, a privilege since affirmed in the Bill of Rights. The case did not, however, decide the second point raised, whether the Courts have power to inquire

into crimes committed in the House, nor has the point been since decided, but, from the *obiter dicta* of the judges in *Bradlaugh* v. *Gossett*[1] it seems evident that members of Parliament, even when in the House, are subject to the criminal jurisdiction of the ordinary Courts.)

FREEDOM OF SPEECH OUTSIDE THE HOUSE

XVI. *Rex* v. *Lord Abingdon*

1794 **1 Esp. 226**

This was an information filed against Lord Abingdon for libel. Lord Abingdon, a member of the House of Lords, had read in that House a speech charging a solicitor with improper conduct. This speech he then printed and published in several newspapers. Lord Abingdon admitted the publication, but claimed that by the law and custom of Parliament a member was allowed to state in the House any facts whatsoever and this statement was not punishable. From this his Lordship contended that he had a right to print what he had a right to deliver, without punishment or animadversion.

HELD: The Court would have no power to call his Lordship to answer for words spoken in the House of Lords, but the privilege claimed to publish outside the House did not exist. A member of Parliament had a right to publish his speech, but that speech must not be a vehicle of slander against any individual; if it was, it was a libel.

Lord Abingdon was found guilty and sentenced to three months' imprisonment, and to pay a fine of £100.

[1] See p. 47.

DISCARDED

XVII. *The King* v. *Creevey*

1813 — 1 M. & S. 273

The defendant was a member of the House of Commons. While in Parliament he had made a speech in which he libelled one Kirkpatrick. An incorrect report of the speech appeared in the Liverpool newspapers, and the defendant sent a corrected report which was published. The indictment charged the defendant with publishing a malicious libel intended to incite discontent and disaffection. The jury found the defendant guilty. The defendant moved for a new trial on the ground that the publication was justified, and the case ought never to have been submitted to the jury.

HELD : A member of Parliament has undoubtedly the privilege for the purpose of producing parliamentary effect of speaking in Parliament boldly and clearly what he thinks conducive to that end. He may cast imputations in Parliament against the character of any individual and still be protected. But he is not at liberty to circulate these imputations elsewhere, and to address them as an *oratio ad populum*, in order to explain his conduct to his constituents.

The publication could not be considered as a proceeding of the Commons' House of Parliament. The occasion did not justify the publication, so as to rebut the inference of malice arising from the matter of it, consequently there was no reason for disturbing the verdict.

THE REPORTS OF THE DEBATES OF EITHER HOUSE ARE PRIVILEGED

XVIII. *Wason* v. *Walter*

1868 L.R. 4 Q.B. 73

The plaintiff presented a petition to the House of Lords charging a high judicial officer with having, thirty years before, made a false statement to his own knowledge, in order to deceive a committee of the House of Commons; and praying inquiry and the removal of the officer, if the charge were found true. In the course of the debate the charge was utterly refuted, and the plaintiff's conduct in presenting the petition was severely criticised. The *Times* newspaper fully reported this debate and the comments on the plaintiff's conduct. The plaintiff brought an action against the editor of the *Times* for libel.

The Lord Chief Justice directed the jury that, if they were satisfied that the matter charged as a libel was a faithful and correct report of the proceedings in the House of Lords, it was in point of law a privileged publication and one which could not be the subject of a civil action and that they should find for the defendant on that count.

The jury found for the defendant.

A rule was afterwards obtained for a new trial, for misdirection.

Cockburn, C.J., in delivering judgment, said:

"The main question for our decision is, whether a faithful report in a public newspaper of a debate in either House of Parliament, containing matter disparaging to the character of an individual, is actionable at the suit of

the party whose character has thus been called in question. We are of opinion that it is not.

" Important as the question is, it comes now for the first time before a Court of Law for decision. . . . The case of *Stockdale* v. *Hansard*[1] is beside the question. The doctrine involved in that case was whether the House of Commons could by their order authorise the violation of private rights, and, by declaring the power thus exercised to be a matter of privilege, preclude a Court of Law from inquiring into the existence of the privilege—doctrines which would have placed the rights and liberties of the subject at the mercy of a single branch of the legislature. To the decision of this Court in that memorable case we give our unhesitating and unqualified adhesion. But the decision in that case has no application to the present. The proposition, that an order of the House of Commons cannot render lawful that which is contrary to law, still less that a resolution of the House can supersede the jurisdiction of a Court of Law by clothing an unwarranted exercise of power with the garb of privilege, can have no application where the question is, not whether the act complained of, being unlawful at law, is rendered lawful by the order of the House or protected by the assertion of its privilege, but whether it is independent of such order or assertion of privilege, in itself privileged and lawful.

" It is now well established that faithful and fair reports of the proceedings of Courts of Justice, though the character of individuals may incidentally suffer, are privileged, and that for the publication of such reports the publishers are neither criminally nor civilly responsible.

" To us it seems clear that the principles on which the publication of reports of the proceedings of Courts of Justice have been held to be privileged apply to the reports of parliamentary proceedings. The analogy be-

[1] See p. 7.

tween the two cases is in every respect complete. If the rule has never been applied to the reports of parliamentary proceedings till now, we must assume that it is only because the occasion has never before arisen. If the principles which are the foundation of the privilege in the one case are applicable to the other, we must not hesitate to apply them. Whatever disadvantages attach to a system of unwritten law, and of these we are fully sensible, it has at least this advantage that its elasticity enables those who administer it to adapt it to the varying conditions of society, and to the requirements and habits of the age in which we live, so as to avoid the inconsistences and injustices which arise when the law is no longer in harmony with the wants and usages and interests of the generation to which it is immediately applied.

" Our judgment will in no way interfere with the decisions that the publication of a single speech for the purpose, or with the effect, of injuring an individual will be unlawful.

" Independently of the orders of the Houses, there is nothing unlawful in publishing reports of parliamentary proceedings. We must treat such publication as in every respect lawful, and hold that, while honestly and faithfully carried on, those who publish them will be free from legal responsibility, though the character of individuals may incidentally be injuriously affected."

Rule discharged.

THE RIGHT OF THE HOUSE OF LORDS TO COMMIT FOR CONTEMPT

XIX. *The Earl of Shaftsbury's Case*

1677 **1 Mod. 144**

The Earl of Shaftsbury was committed to the Tower of London by an order of the House of Lords. After some months of imprisonment he

was brought up before the King's Bench on a writ of *habeas corpus*. The return to the writ stated that, by order of the Lords in Parliament assembled, the Earl of Shaftsbury was committed to the Tower " during His Majesty's pleasure and the pleasure of the House for high contempt committed against this House."

The Earl alleged that the return was insufficient, " for the Court cannot judge of the contempt if it doth not appear in what act it is."

HELD : That such a return made by an ordinary Court of Justice would have been ill and uncertain, but the case was different in the case of this High Court. The King's Bench had no jurisdiction over the matter and therefore the form was not considerable. Though what would be the position if the session were determined, which was not the case, was doubtful, but as the case was, the Court had neither power to bail or discharge the earl.

The prisoner was remanded.

THE RIGHT OF THE HOUSE OF COMMONS TO COMMIT FOR CONTEMPT

XX. *Burdett* v. *Abbot*

1811 **14 East 1**

This was an action of trespass brought by Sir Francis Burdett against the Speaker of the House of Commons for breaking and entering the plaintiff's house, seizing the plaintiff, and imprisoning him in the Tower of London. The defendant by special plea justified the trespass. The House of Commons had resolved that : " The plaintiff had published a

libellous and scandalous paper reflecting on the just rights and privileges of the House, and had been guilty of a breach of the privileges of the House," and the House ordered that the plaintiff should be committed to the Tower of London, and that the Speaker should issue his warrant accordingly. The defendant, as Speaker, in obedience to the direction of the House, issued his warrant to the Sergeant-at-Arms to arrest the prisoner, and to the Lieutenant of the Tower to detain him, and it was in pursuance of these warrants that the arrest and imprisonment complained of took place.

Lord Ellenborough, in his judgment, said :

" The points for our decision are (1) whether the House of Commons has any authority by law to commit in cases of contempt as they can for a breach of privilege, and (2) whether the means used for the execution of the Speaker's warrant were justified.

" Can the High Court of Parliament, or either of the two Houses of which it consists, be deemed not to possess intrinsically that authority of punishing necessarily for contempt, which is acknowledged to belong, and is daily exercised as belonging, to every superior Court of Law of less dignity undoubtedly than itself ? This power to commit is necessary to protect the House from insult and indignity, and past precedents show that this power exists.

" If a commitment appear to be for a contempt of the House of Commons generally, I would neither in the case of that Court, nor of any other of the Superior Courts, inquire further ; but if it does not profess to commit for a contempt, but for some matter appearing on the return, which could by no reasonable intendment be considered as a contempt of the House committing, but a ground of commitment palpably and evidently arbitrary, unjust and

contrary to every principle of positive law or natural justice; I say that, in the case of such commitment, we must look at it and act upon it as justice may require from whatever Court it may profess to have proceeded.

"Assuming that the House has power to commit, were the means which appear to have been used on this occasion for the execution of the Speaker's warrant justifiable? . . . Was the Sergeant-at-Arms justified in breaking into the plaintiff's house to arrest him? In ordinary cases in the execution of civil process between subject and subject a break is not justified. . . . But in the execution of an order of the House of Commons, the mode of executing the warrant as in this case, by breaking into the house after due notification and demand of admittance having been made without effect, is justifiable, upon the grounds of its being an execution of a process of contempt, to which the personal privilege of the individual, in respect of his door, must give way to the public good."

Judgment for the defendant.

THE JURISDICTION OF THE COURTS OF LAW IN MATTERS OF PRIVILEGE

XXI. *Ashby* v. *White*

1704 **2 Ld. Ray. 938**

The plaintiff was a burgess of Aylesbury, and as such entitled to vote for two members of Parliament. On the day of the election he requested the defendants, who were the Returning Officers of the borough, to receive his vote. This the defendants fraudulently and maliciously refused to do, and the plaintiff was not allowed to vote.

The plaintiff brought an action against the Returning Officers, and was awarded damages by the jury. It was moved in the King's Bench in arrest

of judgment that the action was not maintainable. Judgment was given for the defendants by three judges, Holt, C.J., dissenting. The grounds for this decision were that: never such a like action had been brought before; the plaintiff had suffered no actual damage; and the matter was particularly reserved for Parliament as being properly conusable by them alone.

The plaintiff appealed, and the decision was reversed by fifty Lords to sixteen, and the judgment of Holt, C.J., was approved.

Holt, C.J., in his judgment, said:

> "The question is, whether, if a free burgess who has an undoubted right to give his vote in the election of a burgess to serve in Parliament, be refused and hindered to give it by an officer, an action on the case will lie against the officer.
>
> "The plaintiff undoubtedly has a right to vote, and if he has a right he must have a means to vindicate and maintain it. . . . It is alleged that an action on the case is not maintainable because there is no hurt or damage to the plaintiff, but surely every injury imparts a damage, though it does not cost the party one farthing and it is impossible to prove the contrary. The plaintiff was obstructed of his right, and shall therefore have his action. And it is no objection to say that it will occasion multiplicity of actions, for if men will multiply injuries actions must be multiplied too, for every man that is injured ought to have his recompense.
>
> "It is said we cannot judge of this matter because it is a parliamentary thing, it is a matter out of our jurisdiction and we ought not to enlarge it. That we ought not to enlarge our jurisdiction I acknowledge, but we may determine on a charter granted by the King or on a matter of custom without encroaching on Parliament.

"This is a matter of property determinable by us. This privilege of voting does not differ from any other franchise whatsoever. If the House of Commons determine this matter, it is not that they have an original right, but as incident to elections. But we do not deny them their right of examining elections; but we must not be frightened when a matter of property comes before us by saying it belongs to the Parliament; we must exert the Queen's jurisdiction. Therefore my opinion is that the plaintiff ought to have judgment."

XXII. *Bradlaugh* v. *Gossett*

1884 **12 Q.B.D. 271**

The plaintiff, Charles Bradlaugh, was elected a member of the House of Commons in May, 1883. He was not allowed to take the oath required by the Parliamentary Oaths Act, 1866; and on the 9th July, 1883, the House of Commons passed a resolution restraining the plaintiff from taking the oath and resolving that: "the Sergeant-at-Arms do exclude Mr. Bradlaugh from the House until he shall engage not to further disturb the proceedings of the House." The disturbance in question arose from the attempt of Mr. Bradlaugh to take the oath which the law required him to take, and which a resolution of the House prevented him from taking.

The plaintiff sought from the Queen's Bench firstly, a declaration that the order of the House of July 9th be declared to be beyond the power and jurisdiction of the House to make, and to be void; secondly, an order restraining the defendant the Sergeant-at-Arms from preventing him by force from entering the House, and taking the oath as a member.

Stephen, J., in his judgment, said :

" The legal question raised is this : Suppose that the House of Commons forbids one of its members to do that which an Act of Parliament requires him to do, and, in order to enforce its prohibition, directs its executive officer to exclude him from the House by force if necessary, is such an order one subject to the control of any Court of Law ? The House of Commons is not subject to the control of the Courts in its administration of that part of the statute-law which relates to its own internal proceedings, and the use of such actual force as may be necessary to carry into effect such a resolution is justifiable.

" The House of Commons has the exclusive right of interpreting the statute so far as the regulation of the proceedings within its own walls is concerned ; and, even if that interpretation should be erroneous, this Court has no power to interfere with it directly or indirectly. . . .

" That part of the statement of claim which asks us to restrain the Sergeant-at-Arms from using force to prevent the plaintiff from entering the House may be disposed of in a few words. . . . This means the use of such force as may be necessary to prevent the plaintiff from entering such parts of the Houses of Parliament as the order applies to. We should not be warranted in supposing anything else was intended, . . . and to say the House has by law power to exclude one of its members from the House, but has not the power to direct the use of such force for the purpose is contradictory. . . . The only force which comes in question in this case is such force as any man might employ to prevent a trespass on his own land. I know no authority for the proposition that an ordinary crime committed in the House of Commons would be withdrawn from the ordinary course of criminal justice.

" I do not say that the resolution of the House is the judgment of a Court not subject to our revision ; but it has much in common with such a judgment. The House of Commons is not a Court of Justice, but the effect of its

privilege to regulate its own internal affairs practically invests it with a judicial character when it has to apply to particular cases the provisions of an Act of Parliament. We must presume that it discharges this function properly and with due regard to the laws, in the making of which it has so great a share. If its determination is not in accordance with the law, this resembles the case of an error by a judge where decision is not subject to appeal. . . . The maxim that there is no wrong without a remedy does not mean, as it is sometimes supposed, that there is a legal remedy for every moral or political wrong. . . . The law of the land gives no such appeal. There is no precedent in which any Court has ever interfered with the internal affairs of either House of Parliament, though the cases are no doubt numerous in which the Courts have declared the limits of their powers outside of their respective Houses."

Judgment for the defendant.

XXIII. *The Case of the Sheriff of Middlesex*

1840 **11 A. & E. 273**

In accordance with the judgment in *Stockdale* v. *Hansard*,[1] the Sheriff of Middlesex levied execution on the property of the defendant in that case. The House of Commons thereupon resolved that this execution had been levied in contempt of their privileges, and committed the Sheriff for contempt, who was taken into custody by the Sergeant-at-Arms. A writ of *habeas corpus* was moved on the Sheriff's behalf, to which the Sergeant-at-Arms made the following return. He declared that he held the Sheriff in custody under a warrant of the Speaker of the House of Commons ; which warrant stated that

[1] See p. 7.

the House had resolved that the Sheriff of Middlesex, having been guilty of a contempt and breach of privilege of the House, should be committed to the custody of the Sergeant-at-Arms.

Denman, C.J., giving judgment, said :

"I think it necessary to declare that the judgment of this Court in *Stockdale* v. *Hansard*[1] appears to me in all respects correct. The Court decided there that there was no power in this country above being questioned by law.

"The only question upon this return is whether the commitment is sustained by a legal warrant. The great objection to the warrant is that the facts which constitute the alleged contempt are not shown by the warrant.

"We must presume that when any Court, much more when either House of Parliament, acting on great legal authority, takes upon itself to pronounce a contempt, it is so.

"It was urged that this not being a criminal matter the Court was bound by statute to inquire into the case by affidavit ; but I think the provision cited is not applicable. On the motion for a writ of *habeas corpus* there must be an affidavit from the party applying ; but the return if it discloses a sufficient answer puts an end to the case ; and I think the production of a good warrant is a sufficient answer, seeing that we cannot go into the question of contempt on affidavit nor discuss the motives which may be alleged. Indeed it would be unseemly to suspect that a body, acting under such sanctions as the House of Commons, would, in making its warrants, suppress facts, which if discussed, might entitle the person committed to his liberty.

"In the present case I find no authority under which we are entitled to discharge these gentlemen from their imprisonment."

The Sheriff was remanded.

[1] See p. 7.

XXIV. *Howard* v. *Gossett*

1845 **10 Q.B. 359 & 411**

This was an action for trespass, for assault, and for false imprisonment against the defendant, the Sergeant-at-Arms of the House of Commons. The plaintiff had been summoned to attend at the bar of the House of Commons to answer certain inquiries, and he had contemptuously refused to obey the summons. Thereupon the House ordered that the plaintiff should be sent for and brought before the House in the custody of the Sergeant-at-Arms. The Speaker accordingly issued his warrant for the plaintiff's arrest ; and it was in the execution of this warrant that the Sergeant-at-Arms committed the alleged assault and imprisonment.

The Queen's Bench gave judgment for the plaintiff, but this was reversed by the Court of Exchequer Chamber on a Writ of Error.

Parker, B., gave judgment.

" It cannot be disputed, first, that the House of Commons, which forms the Great Inquest of the Nation, has a power to institute inquiries and to order the attendance of witnesses, and, in case of disobedience, can bring them in custody to the bar for purposes of examination. And secondly, if there be a charge of contempt and breach of privilege, and an order to the person charged to attend and answer it, and a wilful disobedience of that order, the House has undoubtedly the power to cause the person charged to be taken into custody and to be brought to the bar to answer the charge ; and, further, the House and that alone, is the proper judge when these powers or either of them are to be exercised.

" The question therefore turns upon the form of the

warrant alone. If it be good, and if it authorised all that is alleged to have been done by virtue of it, the defendant was justified ; if it were bad, or if it did not authorise all that the defendant did, he was not justified. . . . The question as to the validity of the warrant depends for its answer on the principle on which the warrant is to be construed. Is it to be examined with the strictness with which we look at the warrants of magistrates, or others acting by special statutory authority and out of the course of the common law ? Or is it to be regarded as the mandate or writ of a superior Court acting according to the course of the common law ? The Queen's Bench, construing it on the first principle, held it to be void.

" There can be no doubt but that the highest regard is to be paid to all proceedings of the Houses of Parliament, and whenever the contrary does not plainly and expressly appear, it should be presumed that they acted within their jurisdiction and agreeably to the usages of Parliament and the rules of law and justice.

" If, then, we construe this warrant of the Speaker with only the same respect that we should show to a writ of any of the Courts of Westminster, we clearly think we ought to hold it to be valid."

HELD : That the trespasses alleged against the defendant were justified by the warrant of the Speaker, issued in pursuance of the order of the House of Commons.

III

THE HOUSE OF LORDS

The House of Lords, the Second Chamber of the Legislature, is principally composed of hereditary peers, the Bishops who sit while they retain their Sees and the Lords of Appeal who sit for life, being exceptions. Unlike the House of Commons its composition is little affected by statute, and the rules which regulate a right to a seat in it are, for the most part, the result of *quasi* judicial decisions of the House itself. The composition of the House of Lords is largely dependent on the Crown, for the King, as the fountain of honour, has the exclusive right of calling to it as his advisers whom he pleases ; subject only to two statutory and a few common law limitations, which do not, however, limit the number of peers that can be created. It is in the royal power to ennoble any man, and the exercise of this prerogative is controlled rather by expediency than by other trammels.

There are two statutory limitations to this royal prerogative ; by the Act of Union with Scotland, the Crown has no power to create a Scotch peerage ; by the Act of Union with Ireland, the Crown can only create a peer of Ireland in accordance with the provisions of that Act. But these statutory limita-

tions do not touch the general power to create peers of the United Kingdom ; and Scotch and Irish peers, whether they are entitled to a seat in the House of Lords as representative peers or not under the Acts of Union, may be created peers of the United Kingdom, and take a seat by virtue of that creation.

The common law imposes a more serious check on the prerogative. Probably for the first two hundred years after the Norman Conquest the issue of a writ of summons to the Council, which was to develop into the House of Lords, depended on tenure of land. Whether the King's choice of persons who should be summoned was limited to those who held land of him *per baroniam*, is doubtful ; but it is clear that tenure alone did not create a right to a writ of summons, but only a liability. When the estate of the baronage in the fourteenth and fifteenth centuries began to depend, not on birth or tenure, but on the exercise of the royal prerogative in issuing a writ of summons, there was no idea that a baron, summoned to one Parliament, must be summoned to the next ; the issue of such a writ did not fetter the future action of the Crown. It was the judicial decisions of the House of Lords, beginning in the seventeenth century and continuing until to-day—decisions which have been held to have retrospective effect—which have established certain common law limitations on the prerogative. As a result of these, firstly, the Crown cannot limit the extent of a peerage once granted. In creating a peerage, and issuing a writ of summons to Parliament, the King not only confers on the peer himself a right to a seat in Parliament, but also confers such a

right on his descendants. Secondly, though the Crown can confer a peerage on a man for life, such a life peerage cannot carry with it a seat in the House of Lords.[1] Thirdly, it has been further laid down that the Crown cannot in creating a peerage limit its descent in any way unknown to grants of real estate.[2] The grant of a peerage has thus, as a result of various decisions of the House of Lords, been held to confer definite rights which the Crown cannot alter.

The effect of these decisions is that a writ of summons to Parliament, followed by an actual sitting in any Parliament since 1295, gives an hereditary right to a writ of summons.[3] Once such a right has been created it is not in the power of the Crown or the peer to drown or extinguish the right ; it exists for ever, and only comes to an end with the failure of the heirs of the grantee or by Act of Attainder. The grant of a peerage is held to ennoble a man's blood, and the blood once ennobled remains so. Consequently the Crown cannot accept the surrender of a peerage and re-grant it to another.[4]

The Crown cannot withhold a writ of summons from a peer who is entitled to a seat in the House of Lords.[5] The inconvenience of this was felt during the late War, when several members of the House of Lords were fighting in the German army, and the *Titles Deprivation Act*, 1917, was passed, which takes away the right to a writ of summons from peers who have fought in the forces of the enemy.

[1] Wensleydale Peerage Case, XXIX.
[2] Buckhurst Peerage Case, XXVIII. [3] Clifton Peerage Case, XXV.
[4] Grey of Ruthyn Peerage Case, XXVI. [5] Lord Bristol's Case, XXX

The right to a writ of summons now depends solely on a grant from the Crown, and the claim that a right to such a writ goes with the holding of certain land has been invalidated.[1]

All claims to a seat in the House of Lords are in the form of petitions to the Crown. The Crown refers the matter to the House of Lords, who in turn refer it to a Committee of Privileges, a body consisting of a selected number of their own members. The Committee hears the claim, which is argued as in a Court of Law, and reports upon it to the House, which adopts the decision and reports to the King. Though the Committee of Privileges proceeds as a Court of Law, it is not bound by its own previous decisions.[2]

The jurisdiction of this Committee of Privileges is not limited to matters which are originally placed before the House of Lords by the Crown, for that House has power to refer to it other points of law.[3]

THE EFFECT OF THE RECEIPT OF A WRIT AND THE TAKING OF A SEAT IN PARLIAMENT

XXV. *The Barony of Clifton*

1673 **Collins' Baronies 291**

This was a petition by Lady O'Brien and her son claiming the Barony of Clifton.

Sir Jervas Clifton was summoned to Parliament by writ dated July 9, 1612, and took his seat as one of the Peers of England. The petitioner was lineally

[1] Berkeley Peerage Case, XXXII. [2] Norfolk Peerage Claim, XXVII.

[3] Lord Wensleydale's Case, XXIX.

descended from him, was his heir, and as such, claimed the Barony of Clifton.

HELD: that "first, the said Jervas Clifton, by virtue of the said writ of summons, and his sitting in Parliament accordingly, was a peer and baron of this kingdom, and his blood thereby ennobled.

"Secondly, that his said honour descended from him to his sole daughter and heir, and successively, after several descents, to the petitioner as lineal heir to the said Lord Clifton.

"Thirdly, that therefore the petitioner is well entitled to the said dignity."

A PEERAGE CANNOT BE ALIENATED OR SURRENDERED TO THE CROWN

XXVI. *The Barony of Grey of Ruthyn*

1640 **Collins' Baronies 195**

Charles Longville by petition claimed the Barony of Grey of Ruthyn, on the ground that he was the heir of Reginald Grey of Ruthyn, who was summoned to, and sat in, the High Court of Parliament, in the reign of Edward III. Charles I. referred this petition to the Committee of Privileges of the House of Lords.

The judges, in delivering their opinion, said:

"In the argument mention was made of a power of surrendering or conveying away an honour. It was resolved *nemine contradicente* that no person who has any honour in him, nor a peer of the realm, may alienate or transfer the honour to any other person. No peer of this realm can drown or extinguish his honour (but that it descends unto his descendants), neither by surrender, grant, fine, nor any other conveyance to the King."

XXVII. *Earldom of Norfolk Peerage Claim*

1907 **[1907] A.C. 10**

In this case Lord Mowbray claimed to be Earl of Norfolk in the peerage of England, as senior co-heir under a charter granted by Edward II. in 1312. By that charter Edward II. granted to Thomas de Brotherton and the heirs of his body the earldom, which Roger le Bygod, Earl of Norfolk, had surrendered to Edward I. in 1302. The claimant proved his descent from Thomas de Brotherton, and that Thomas had frequently been summoned by the King's writ to Parliament and sat accordingly. Lord Mowbray alleged that the earldom went into abeyance in 1478, and prayed that the abeyance might be determined in his favour.

HELD: that it is settled law

> "that no peer of this realm can drown or extinguish his honour (but that it descends to his descendants), neither by surrender, grant, fine, nor any other conveyance to the King."

Consequently the surrender by Bygod was invalid in law, and the charter of 1312 invalid too. Further, the fact that Thomas de Brotherton had sat in Parliament under the King's writ could not create an earldom. Historically, a right of peerage is a right to be especially summoned by name to Parliament. According to law, the heirs of a person so summoned and sitting are entitled to be summoned in like manner. But it has never been held that such a writ, followed by sitting, will confer title to any particular rank in the peerage; which can only be done in the accustomed way. The writ followed by

sitting would no doubt confer a peerage on Thomas de Brotherton if he had it not before, but could not confer an earldom on him, although he was summoned by that description.

The Committee of Privileges reported to the House of Lords that the claimant had not established his title to the dignity in question.

THE LIMITATIONS OF PEERAGES MUST BE SUCH AS ARE KNOWN TO REAL PROPERTY LAW

XXVIII. *The Buckhurst Peerage Case*

1876 **2 A.C. 1**

By letters patent, dated 27th April, 1864, Elizabeth Countess De la Warr was created Baroness Buckhurst for her life, and then to hold the honour of Baron Buckhurst to her second son and his heirs male, and in default to her third son and his heirs male, and so on to the other younger sons of the same lady. The patent then went on to provide that if any person, taking under this patent, should succeed to the Earldom of De la Warr, the succession to the honours and dignities created by the patent should devolve on the person who would next be entitled to succeed to the dignity of Baron Buckhurst, if the person so succeeding to the Earldom of De la Warr, were dead without issue male. The object of the proviso was to keep the Earldom of De la Warr, which was held by the Countess De la Warr's eldest son, distinct from the Barony of Buckhurst, and to prevent the dignities of De la Warr and Buckhurst being held together by the same person.

The Baroness died in 1870, and her second son Reginald became Baron Buckhurst. Her eldest son, the sixth Earl De la Warr, died unmarried in 1873, and her second son, Baron Buckhurst, became the seventh Earl De la Warr. The Baroness' third son claimed to be entitled under the above patent to a seat in the House of Lords as Baron Buckhurst. In 1876 Reginald, the then Earl De la Warr, petitioned Her Majesty to declare that the shifting clause in the patent was invalid, and did not pass the title to the petitioner's brother.

HELD: that, if the object of the clause was to prevent the dignities of De la Warr and Buckhurst being held together by the same person, and if this was to be effected by taking from a Lord Buckhurst, who became Earl De la Warr, his dignity of Buckhurst and giving it to another person, the Crown had no power to grant a dignity with such a shifting and transferable quality. Further, that the dignity of a peer could not be transferred or surrendered, nor could it be taken away except by Act of Attainder; and the Crown could not create a dignity with a limitation or condition unknown to the law. To grant a dignity, with a proviso that in case the grantee shall succeed to another dignity, he shall cease to hold the created dignity, which shall thenceforth devolve upon another person, was to give it a transferable quality which by law could not be annexed to it, and to deprive the grantee of the dignity vested in him, which in its essence was incapable of a determination during the life of the holder except by Act of Attainder.

FURTHER HELD: that when the Crown is pleased

to refer to the House of Lords the consideration of a patent of peerage, it becomes the duty of the House to inform the Crown what is the construction to be put upon the terms of any clause in the patent. One clause in a patent may be invalid without affecting the validity of the patent itself.

THE POWER OF THE CROWN TO CREATE LIFE PEERAGES

XXIX. *The Wensleydale Peerage Case*

1856 5 H.L.C. 958 Hansard 140 3rd Series 263

The Crown by letters patent purported to create the Right Hon. Sir James Parke a Baron of the United Kingdom for life, by the title of Baron Wensleydale. The patent further purported to confer on him a right to a seat in Parliament. The letters patent were followed by a writ of summons to Parliament in the usual form.

A copy of the letters patent was laid before the House of Lords. A debate ensued as to the validity of the patent, and the right of the Crown to confer on any person a right to a seat in the House for life only. Lord Campbell, in the course of the debate, said :

> " a writ of summons without the patent is conclusive evidence of an intention to create a barony in fee, which is clearly within the prerogative of the Crown ; but the writ with the patent, as clearly shows the intention merely to give operation to the patent, and that the nominee shall have nothing beyond the dignity and privileges which the patent may lawfully confer."

The House of Lords referred the matter to the Committee of Privileges for consideration and

examination, and to report thereon to the House. The power of the House to question the validity of a grant of a peerage by the Crown without a reference from the Crown was questioned, both in the House and by the Committee of Privileges, and it was held that such a power existed.

The Committee of Privileges reported that

> " neither the said letters patent, nor the said letters, with the usual writ of summons issued in pursuance thereof, can entitle the grantee therein named to sit and vote in Parliament."

The House of Lords affirmed this resolution.

THE RIGHT OF THE CROWN TO REFUSE A WRIT OF SUMMONS TO A PEER

XXX. *Lord Bristol's Petition to the House of Lords*

1625 **1625 III Lords' Journal 537**

Lord Bristol, a peer of the realm and a member of the House of Lords, had not received a writ of summons to Parliament, and he petitioned the House of Lords to become mediators for him to His Majesty. The House referred the matter to the Committee of Privileges.

The Committee reported that a writ of summons had been withheld from Lord Bristol,

> " but that after diligent search no precedent being found that any writ of summons had been detained from any peer that was capable of sitting in the House of Parliament, and considering withall how far it might trench into the right of every member of the House, whether sitting by ancient right of inheritance or by patent to have their writs detained, the Lords Committee was of opinion that it was necessary for the House humbly to beseech His

Majesty that a writ of summons might be sent to the petitioner, and to such other Lords to whom no writ of summons had been directed for that Parliament; excepting such as were not capable to sit in Parliament by judgment of Parliament or any other legal judgment."

The House petitioned the King, and was informed that upon this petition the King had sent Lord Bristol a writ of summons.

BARONIES BY TENURE

XXXI. *The Fitzwalter Peerage Case*

1660 **Collins' Baronies 268**

Cheek and Mildmay both claimed the Barony of Fitzwalter. Cheek based his claim on the ground that the barony was a barony by tenure and ought to go with the land, which was vested in himself. Mildmay claimed as being the heir general in the direct line of Robert, first Lord Fitzwalter, created baron by writ in the reign of Edward I.

HELD: that,

"Baronies by tenure had been discontinued for many ages and were not then in being and so they were not fit to be revived, or to admit any pretence or right of succession thereupon."

HELD: Mildmay was entitled to sit in the House of Lords as Baron Fitzwalter.

XXXII. *The Berkeley Peerage Case*

1861 **8. H.L.C. 21**

Sir Frederick Maurice Fitzhardinge Berkeley, being seised under the will of the last Earl Berkeley as tenant for life of the Castle of Berkeley and all the

hereditaments constituting the Barony of Berkeley petitioned the Crown, to be allowed in virtue of the possession of this castle and barony, the dignity and honour of Baron of Berkeley and to be summoned as a peer to Parliament, in right of such dignity and honour.

The petition having been referred in the usual manner to the House of Lords, the claim was appointed for hearing before a Committee of Privileges.

The petitioner's claim was entirely based on the ground that, as devisee for life of the Castle of Berkeley, he was entitled to a writ of summons to the House of Lords. The petitioner in no other way claimed to be connected with this barony than as devisee, and admitted that to whomsoever the late Earl of Berkeley might have thought fit to devise the castle and lands in question for an estate of freehold, that devisee would have had the rights now insisted on by the petitioner.

The petitioner supported his claim by two instances in which, with licence from the Crown, the castle and territorial barony of Berkeley had been settled, and the right to a writ of summons to Parliament had been allowed to pass to the person for the time being entitled under the settlement. There was, however, no case to be found of a barony by tenure, with a right to a seat in Parliament, being transferred to a stranger by will.

The Attorney-General for the Crown opposed the petition. Firstly, on the ground that it was inconsistent with the idea of nobility ; which was that a peer is ennobled in blood and that nobility, conferred on him by the dignity of the creation, descends to

his heirs. Secondly, on the ground that it was inconsistent with the settled principles of constitutional law. The records of the House of Lords showed, that for at least four centuries, there had been no other foundation for a title to a seat in the House than was derived from creation by writ or patent of the Crown. Thirdly, the claim was inconsistent with the settled opinion of the prerogative of the Crown. The Crown was the fountain of honour. One of its prerogatives was the right to *delectus personarum* on whom the privilege of nobility should be cast. But the principle of this claim was that peers were to be created at the will of private persons. Fourthly, the claim was impossible to reconcile with the present condition of the law of real property.

The Committee of Privileges came to the conclusion that baronies by tenure were not now in existence, and that no transfer of a Parliamentary barony could now be made by any settlement of the territorial barony from the heirs entitled to succeed to it.

The Committee resolved that Sir M. F. Fitzhardinge Berkeley had not made out his claim to the title, honour, and dignity of Baron Berkeley. This resolution was reported to and adopted by the House of Lords.

PART II

THE CROWN

IV

THE RELATION OF THE PREROGATIVE TO STATUTE

The King in Parliament is that sovereign power in the State which makes and unmakes the laws, and can alter the constitution whether it is based on the Common Law or Statute. The Crown by its servants enforces these laws, and through its Courts interprets them. The Common Law vested in the Crown the executive powers. Many of these powers still exist and form the prerogative, others have been destroyed, altered or enlarged by statute. The executive to-day is vested in the Crown and its servants. The Cabinet collectively decides on the policy of the country, which is carried into effect by the ministers of the King and the subordinate officials and Government departments, who derive their powers either from the prerogative or statute.

The prerogative has been described by Professor Dicey as " The residue of discretionary or arbitrary authority which at any given time is legally left in the hands of the Crown ; " those things which the King and his servants can do without the authority of an Act of Parliament. It consists of a heterogeneous mass of rights vested in the Crown, some

conferred or defined by statute, but the most part deriving their authority from the Common Law.

The prerogative powers can be roughly divided into three : firstly, the Crown enjoys certain personal privileges such as complete immunity from the jurisdiction of the Courts, which results from the principle that the King can do no wrong ; secondly, the Crown has certain rights to property such as the right of escheat, to treasure trove, to royal sturgeons, etc. ; thirdly, the Crown has certain residuary executive powers. It is this latter group which is the most important of the three. These powers are of wide extent and still leave much authority in the hands of the Crown.

Not the least of these powers is the control of foreign relations which is largely in the hands of the Crown ; for the power of making treaties is one of the prerogatives. The Crown can enter into what engagements it pleases with foreign countries and these will be binding and effective. The only limitation is that such a treaty must not infringe the private rights of the individual ; if it does, to that extent the treaty is not binding or enforceable by the Courts, unless it has been sanctioned by an Act of Parliament.[1] It was for this reason that the various treaties ending the late War were enacted as statutes.

The extent of the prerogative has been lessened in the course of time. For example, in early days the Crown claimed a right to grant monopolies to any of its subjects,[2] and to requisition the subject's property in time of war.[3] But these powers have

[1] Walker *v.* Baird, XLI. [2] The Case of Monopolies, XXXV.

[3] The Case of Saltpetre, XXXVI.

been abolished or cut down by statute. Wide as these rights of the Crown are, they are not independent powers, subject to no check, answerable to no master. For the prerogative is not a sovereign power, but part of the common law. There are two checks upon it, firstly, it is subject to parliamentary control, both directly and indirectly, and secondly, it is subject to the supervision of the Courts. The prerogative is indirectly subject to parliamentary control, in that it is only exercised by the King acting through his ministers, who though technically his servants, are in fact the servants of Parliament. Upon the consent of that body depends, not only the legislation for carrying much of their policy into effect, but also the revenue to carry on the Government. Without the support of Parliament the executive could not exist. The prerogative is directly subject to the sovereign legislature in that Parliament can modify or destroy it. As for example was done when the Bill of Rights abolished the suspending and dispensing power of the Crown. The King can neither exercise a power which has been destroyed, nor exercise a power which has been modified by statute, otherwise than according to statute.[1] The prerogative is thus liable to be overridden, altered, or destroyed at the will of the sovereign legislature; but the Crown is to some extent privileged, in that its right cannot be altered by any statutory implication. These powers can neither be abolished nor altered, unless the statute purporting to affect the prerogative does so in express terms.[2]

[1] The Attorney-General *v.* De Keyser's Royal Hotel, XXXVII.

[2] Hornsey District Council *v.* Hennell, XXXIII.

The second limitation to the Crown's power is that the prerogative is not, as Blackstone seemed to think, a power outside the common law ; but it is a power which exists either at common law or by statute, and as such it is as the rest of the law, and it is as liable to be adjudicated upon. The Courts have power to supervise the exercise of the prerogative, and to declare illegal any act which passes beyond the limits set by custom or by statute. The Courts must accept and obey the acts of the legislature, but they can and do call in question the acts of the Crown. The legislation of Parliament cannot be questioned or set aside as being against the principles of justice or against the constitutional law of the country. Where the Crown has power, either by virtue of some statute or common law right, to legislate by Orders in Council, the Courts supervise such legislation ; and if it is not within the authority which the Crown possesses, declare it to be *ultra vires*, void, and not enforceable.[1]

SHOWING THAT THE CROWN IS NOT BOUND BY STATUTE UNLESS EXPRESSLY MENTIONED

XXXIII. *The Hornsey Urban District Council* v. *Hennell*

1902 **[1902] 2 K.B. 73**

The Public Health Act of 1875 imposes on the owner of property abutting on any new street the obligation of paying a certain proportion of the expenses of making up the street. The Crown was

[1] The Newcastle Breweries *v.* The King, XL.

not named in the Act. The appellants repaired the street in front of a certain property, and tried to recover an apportioned part of the expenses from the respondent, who was a Colonel in His Majesty's army.

At the hearing of the complaint before the justices it was contended for the respondent that the premises in question were owned and occupied by servants of the Crown for the purposes of the Crown, and consequently the respondent was exempt from liability to pay any of the apportioned expenses.

The justices were of opinion that the respondent was not liable to pay the apportioned expenses and dismissed the summons.

HELD : on appeal, that the premises must be taken to be owned and occupied for Crown purposes, and that therefore the amount of the apportionment could not be recovered as the Public Health Act was not binding on the Crown.

In delivering the judgment of the Court of Appeal Lord Alverstone said :

> " The Colonel is a mere trustee and has no personal beneficial interest. There is an ownership and occupation for and on behalf of the Crown, and the appellants must show some words which impose upon the Crown an obligation to do the work or pay the expense of it. The principle that Acts of Parliament do not impose pecuniary burdens upon Crown property, unless the Crown is expressly named, or unless by necessary implication the Crown has agreed to be bound, is in our opinion still applicable to such a case. The intention that the Crown shall be bound, or has agreed to be bound, must clearly appear either from the language used or the nature of the enactments, and there is nothing in the

provisions of the Public Health Act applicable to this case which gives rise to any such presumption."

Appeal dismissed.

XXXIV. *Perry* v. *Eames*

1891 **[1891] 1 Ch. 658**

In 1820 the site of the old Bankruptcy Court in Basinghall Street was purchased by the Crown ; the legal estate was vested in trustees, but the sole equitable ownership was in the Crown for the public purposes of various Acts of Parliament. In 1886 the Crown sold the site to the Corporation of the City of London, and in 1890 it became vested in the defendant, under a building agreement with the Corporation.

The defendant began his building operations, and the plaintiff brought his action to restrain the defendant erecting any building higher than the old Bankruptcy Court, on the ground that the plaintiff was entitled to a right of light subject only to the obstruction caused by that building.

No prescriptive right to such access of light had been acquired prior to 1820, but the plaintiff claimed that such right had been acquired under S. 3 of the Prescription Act since that date.

Held : that as the Crown was not named in S. 3 of the Prescription Act, and as there was no circumstance sufficient to raise a necessary implication or to support an irresistable inference of intention to bind the Crown, the Crown was not bound by the section.

The prerogative of the Crown had prevented the

plaintiff acquiring any right to the access of light over the defendant's buildings.

Action dismissed.

SHOWING THAT THE CROWN HAS NO POWER TO GRANT MONOPOLIES

XXXV. *The Case of Monopolies*

1588 **11 Rep. 84 B.**

Elizabeth had granted Darcy, the plaintiff, the sole right of making playing cards in England, and of importing foreign makes. In spite of this grant the defendant had both made and imported playing cards. Darcy brought an action to uphold his monopoly.

The case raised two points :

Firstly, if the grant to the plaintiff of the sole making of playing cards was good or not ;

Secondly, if the licence to have the sole importation of playing cards was good in law notwithstanding 3 E. 4, which imposed a penalty on all imported cards.

HELD : that the grant to the plaintiff of the sole making of cards within the realm was void for two reasons : " firstly, that it is a monopoly, and against the common law ; secondly, that it is against divers Acts of Parliament." As to the second question, it was resolved that the dispensation to have the sole importation, notwithstanding the Act, was void.

THE RIGHT OF THE CROWN TO REQUISITION THE PROPERTY OF THE SUBJECT

A. AT COMMON LAW

XXXVI. *The Case of the King's Prerogative in Saltpetre*

1607 **12 Rep. 12**

All the judges were consulted as to what prerogative the King had in the digging and taking of saltpetre. They held unanimously that :

" Inasmuch as saltpetre concerns the necessary defence of the realm the King may take it. By the Common Law every man may come upon my land for the defence of the realm as appears in 8 Ed. 4, 23, and as in such a case and in such extremity they may dig for gravel, for the making of bulwarks ; for this is for the public and everyone may have benefit by it, but after the danger is over, the trenches and bulwarks ought to be removed, so that the owner may not have prejudice in his inheritance ; and for the commonwealth a man shall suffer damage : as, for saving a city, a house shall be plucked down if the next be on fire ; and the suburbs of a city in time of war for the common safety shall be plucked down ; and a thing for the commonwealth every man may do without being liable to an action.

" It was resolved that this taking of saltpetre was a purveyance of it for the making of gunpowder for the necessary safety and defence of the realm. And for this cause, as in other purveyances, it is an incidence inseparable to the Crown, and cannot be granted, demised, or transferred to any other, but ought to be taken only by the minister of the King, and cannot be converted to any other use than the defence of the realm, for which purpose only the law gave the King this prerogative."

B. BY STATUTE

XXXVII. *The Attorney-General* v. *De Keyser's Royal Hotel, Limited*

1920 **[1920] A.C. 508**

In 1916 headquarters were required for the Royal Flying Corps, and the Board of Works approached the liquidator and manager of De Keyser's Hotel, Limited, with a view to taking over the hotel for the duration of the War. These negotiations were unsuccessful, and the Board of Works advised the War Office to requisition the premises under the Defence of the Realm Acts. On May 1st the War Office wrote as follows to the Receiver :

> " I am instructed by the Army Council to take possession of the De Keyser's Royal Hotel under the Defence of the Realm Regulations. . . . I enclose forms of claim for submission to the Defence of the Realm Losses Commission. Compensation, as you are probably aware, is made, *ex gratia*, and is strictly limited to the actual monetary loss sustained."

The Receiver protested against this notice on the ground that he did not consider the requisition within the powers conferred by the Regulations ; he then yielded possession to the Crown, while reserving the rights of all persons interested in the hotel. The negotiations for fixing compensation broke down, and the Receiver refused to go before the Losses Commission. The De Keyser Company presented a Petition of Right. The relief asked for Was :

Firstly, a declaration that the suppliants were entitled to rent so long as the Crown continued in possession of the premises.

Secondly, a declaration that the suppliants were entitled to rent by way of compensation under the Defence Act, 1842.

The Attorney-General's defence was that no rent or compensation was by law payable to the suppliants, either under the Defence Act, 1842, or at all.

The Court of Appeal held that the suppliants were entitled to rent under the Defence Act, 1842. The Crown appealed to the House of Lords.

The argument for the Crown was that the taking was either by virtue of the Royal Prerogative, or under the Defence of the Realm Consolidation Act, 1914. The Act of 1914 was made without reference to the Act of 1842, and in acting under the later Act, the Crown was not bound to pay the compensation required by the earlier Act. Further, by virtue of the prerogative, the Crown could make temporary use of the subject's property for the defence of the realm without giving rise to any legal obligation to pay compensation.

Lords Dunedin, Atkinson, Moulton, Sumner and Parmoor were unanimous in their decision. In the course of the judgment it was said :

> " That the act of taking by the Crown was in itself legal is necessarily admitted by both sides. If it were illegal then it would be a tort not committed by the Crown, who cannot commit a tort, but by the officers of the Crown, and the Petition of Right would not lie. The only point is, the Crown having legally taken, is it bound to pay compensation *ex lege* or is the offer to pay compensation *ex gratia*, in which case compensation may be fixed by the Losses Commission, a sufficient offer and answer to all demands. . . .
>
> " With regard to the claim that the taking was justified

by the prerogative alone. The Defence Acts, 1803-1842, contain a code for the taking of land in time of peace as well as in time of war. The appellants contend that as there is no direct mention of the prerogative in these statutes the Crown is not bound. On this point I think the answer of the Master of the Rolls is unanswerable. He says, 'What use would there be in imposing limitations if the Crown could at its pleasure disregard them and fall back on the prerogative?' In as much as the Crown is a party to every Act of Parliament, it is logical enough to consider that when the Act deals with something which before could be effected by the prerogative and especially empowers the Crown to do that same thing, but subject to conditions, the Crown assents to that, and by that assent to the prerogative being curtailed. When powers covered by statute are exercised by the Crown, it must be presumed that they are exercised under the statute and therefore subject to the equitable provision for compensation which is to be found in it. The executive in this case did not take possession under the prerogative, for the Defence Acts had superseded it.

"The Act of 1842 contemplates first voluntary purchase, but if that cannot be arranged, then the lands may be acquired compulsorily subject to certain certificates being obtained as to the necessity for the acquisition and to certain restrictions as to notice, etc., being complied with. The Act then provides for the assessment of compensation by inquiry. The Defence of the Realm Act gives His Majesty power during the continuance of the war to issue regulations for securing the public safety and the defence of the realm; particularly Subsection 2 says that any such regulations may provide for the suspension of any restrictions on the acquisition or user of land under the Defence Acts, 1842. Pursuant to this Act a regulation was issued, which empowered the competent naval or military authority, for securing the public safety, to take possession of any land or buildings. It is clear

that under these subsections the taking of the De Keyser Hotel was warranted, but there was no necessity for the public safety, or the defence of the realm, that payment or compensation should not be made. The methods of war have so changed since 1842 that the restrictions imposed by that Act might embarrass the Crown, while if the restrictions were removed the Act would be adequate. The Act of 1914 is confined to removing these restrictions. It seems clear that the legal obligation to pay for the land or its use is not a restriction on the acquisition. It is a consequence of the taking but in no way restricts it; and therefore as the acquisition must be held to be under the Defence Act, 1842, the suppliants are entitled to the compensation provided by that Act."

HELD: that the Crown is not entitled as of right either by virtue of its prerogative or under any statute, to take possession of the land or buildings of a subject for administrative purposes in connection with the defence of the realm without paying compensation for their use and occupation.

Appeal dismissed.

THE POWER OF THE COURTS TO SUPERVISE LEGISLATION BY ORDER IN COUNCIL

XXXVIII. *The King (at the Prosecution of A. Zadig)* v. *Halliday.*

1917 **[1917] A.C. 261**

The appellant, A. Zadig, who was born in Germany of German parents, became a naturalised British subject in 1905. On October 30th, 1915, he was interned under an order of the Home Secretary: This Order was made under Reg. 14B of the Defence of the Realm (Consolidation) Regulations,

1914, which purported to be made under S. 1, Subs. 1 of the Defence of the Realm Consolidation Act, 1914. The appellant contended that Reg. 14B was not authorised by the Act and was *ultra vires*.

On January 11th, 1916, the appellant obtained from the King's Bench Division a rule *nisi* calling on the respondent, the governor of the internment camp, to show cause why a writ of *habeas corpus* should not issue. On cause being shown the Divisional Court discharged the rule *nisi*, and the order of the Divisional Court was affirmed by the Court of Appeal. The appellant appealed to the House of Lords.

The Defence of the Realm Consolidation Act, 1914, S. 1, Subs. 1, was as follows :

> " His Majesty in Council has power during the continuance of the present war to issue regulations for securing the public safety and the defence of the realm,"

and the Act went on to enumerate certain particular instances when such regulations could be made, such as regulations designed for preventing communication with the enemy, for securing the safety of His Majesty's forces and ships, for preventing the spread of false reports, and otherwise for preventing assistance being given to the enemy,

The Regulation 14B, made under the powers conferred by this Act, was as follows :

> " Where on the recommendation of any competent naval or military authority it appears to the Secretary of State that for securing the public safety or the defence of the realm it is expedient, in view of the hostile origin or association of any person, that he shall be subjected to such obligations and restrictions as are hereinafter men-

tioned, the Secretary of State may by order require that person . . . to be interned in such place as may be specified on the order."

The order under which A. Zadig was imprisoned was valid if the regulation under which it purported to be made was valid. The legal validity of the regulation was the only question for decision in this case. Was it *intra* or *ultra vires* of the statute? Did the authority to issue regulations for securing the public safety and the defence of the realm authorise preventive detention, which the appellant alleged was imprisonment without trial?

Held by Lord Finlay, L.C., Lord Dunedin, Lord Atkinson, and Lord Wrenbury that the regulation was within the authority given by the Act, and the contention that it was *ultra vires* failed.

In the course of the judgments it was said that the Act authorised the issue of regulations for preventive purposes such as preventing persons communicating with the enemy. The purpose was not to punish a man for having done something, but to prevent him from doing it. The statute placed no limit on the steps to be taken so to prevent him. Except that the authority conferred must be exercised honestly there was no other limit upon the acts the regulations may authorise to achieve the defined object.

The appellant was under a misapprehension in stating that the regulation in substance suspended the *Habeas Corpus* Act. If his case was that he had neither hostile origin or associations, he could have his writ of *habeas corpus* on the ground that that was so, and if he established the fact he would be discharged. The *Habeas Corpus* Act was in full force,

but the statute in dispute and the regulations made under it, have provided machinery for achieving, in a way other than that of suspending the *Habeas Corpus* Act, the preventive detention of persons who were not alleged to have committed any offence, but whom it was desired to prevent from committing one.

Lord Shaw of Dunfermline dissented from the judgment of the majority of the Court on the ground that Parliament did not, and did not intend, by the words of the Act of 1914, to remove "the clear principle of our Constitution that no man can be detained in prison without trial."

Order of the Court of Appeal affirmed.

XXXIX. *Chester* v. *Bateson*

1920 **[1920] 1 K.B. 829**

The plaintiff had let a house to the defendant, who was a workman engaged in making munitions of war. On the expiration of the tenancy the plaintiff served on the defendant a notice to quit; possession, however, was not given up in accordance with the notice, and the plaintiff preferred a complaint under the Small Tenements Recovery Act, before a Court of summary jurisdiction. The defence submitted was that the plaintiff, under the Defence of the Realm Regulations, could not commence such proceedings without the consent of the Minister of Munitions. The plaintiff contended that the regulations were *ultra vires*. The justices held that it was essential before the proceedings could be taken that the plaintiff should obtain the consent of the Minister of Munitions.

The plaintiff appealed.

By the Defence of the Realm Consolidation Act, 1914, His Majesty in Council was given power "during the continuance of the present war to issue regulations for securing the public safety and the defence of the realm"; and particularly to issue regulations designed to prevent "the successful prosecution of the war being endangered." In purported exercise of these powers Reg. 2A of the Defence of the Realm Regulations was issued, on which the defendant based his case.

The regulation provided that, while it remained in force, no proceedings should be taken for the ejectment of a tenant occupied in manufacturing war material without the previous consent of the Minister of Munitions.

The effect of this regulation was that if any person, without the required consent, commenced proceedings in any of the King's Courts of Justice, he was guilty of a criminal offence and liable to six months' imprisonment, or a fine of £100, or both.

The question raised by the appeal was whether this regulation was *ultra vires* the statute under which it purported to be made.

Darling, J., Avory, J., and Sankey, J., unanimously held it was.

Avory, J., in the course of his judgment, said:

> "The question whether this regulation is *ultra vires* depends on whether it can be said, on any reasonable construction of the statute, to be a regulation for securing the public safety and the defence of the realm; and particularly whether it can be said to be a regulation to prevent the successful prosecution of the war being endangered.

. . . The purpose in view when the regulation was made, namely, to prevent the disturbance of munition workers in their dwellings may, without doubt, be said to be reasonable; and a regulation, designed to prevent such disturbance, providing that no order for ejectment should be made except under conditions prescribed, would probably be held to be *intra vires* the statute; but the objection to the regulation as it stands is that it deprives the King's subjects of their right of access to the Courts of Justice, and renders them liable to punishment if they have the temerity to ask for justice in any of the King's Courts. . . . In my opinion there is not to be found in the statute anything to authorise or justify a regulation having that result; and nothing less than express words in the statute taking away the right of the King's subjects of access to the Courts of Justice, would authorise or justify it.

" I have based my judgment solely on the construction of the statute which confers the power to make regulations. If the question had to be determined on a question of constitutional law I should agree that this regulation is in conflict with the provisions of *Magna Charta* and the Bill of Rights, which provides that the pretended power of suspending the laws, or the execution of laws, by royal authority without consent of Parliament is illegal; and particularly it would be in violation of the Statute of Northampton, 2 Edw. 3, c. 8, which provides: ' It is accorded and established that it shall not be commanded by the Great Seal nor the Little Seal to disturb or delay common right; and though such commandings do come, the justices shall not therefore leave to do right in any point.' "

Appeal allowed.

XL. *The Newcastle Breweries, Limited* v. *The King*

1920 **[1920] 1 K.B. 854**

The suppliants were brewers and wine merchants at Newcastle and were the owners of 658 puncheons

of rum. In October, 1917, the Admiralty, by written notice, declared their intention to take possession of the whole supply, and in November they in fact requisitioned 239 puncheons. The suppliants claimed the market value of the 239 puncheons, and that the amount of such value should be determined by a Court of Law. The Admiralty rejected both claims ; they paid the suppliant about one-third of the market value of the rum, and declared that no further payment would be made unless advised by the Losses Commission. The suppliants refused to apply to this Commission, and presented a Petition of Right asking for a declaration that they were entitled to the fair market value of their rum, and to have that value assessed by a Court of Law.

Salter, J., giving judgment said :

> " The Crown relies on Regulation 2B of the Defence of the Realm Regulations. Up to the time of making this regulation, the rights and duties of the Crown in the requisition of the subject's chattels were regulated by the Army Act, 1881, and the Amending Acts. . . . Under these Acts the Army Council are to cause payment to be made for goods requisitioned ; any difference as to amount is to be assessed by a County Court judge, the rate of payment being the fair market value of the article requisitioned, as between a willing seller and a willing buyer. If the Admiralty had proceeded under these statutes the suppliants would have been entitled to the fair market value."

The Crown, however, acted under the Defence of the Realm Consolidation Act, 1914, which gave the Crown power to issue regulations for securing the public safety and the defence of the realm. Regulation 2B, under which the Crown acted, purported

to be issued under the Act of 1914. This regulation gave the Admiralty power to take possession of food, etc., and the price to be paid for goods so taken was, in default of agreement, to be assessed by the tribunal established for the purpose. The regulation further laid down that in determining such price, regard need not be had to the market price, but rather to the cost of the production, and rate of profit usually earned.

" It is contended that the whole of the latter part of this regulation is invalid. The question for the Court is whether it is within the legislative powers delegated by the Defence of the Realm Act, 1914. . . . The test to be applied is whether this part of Regulation 2B is reasonably capable of being a regulation for securing the public safety and the defence of the realm.

" With regard to that part of the regulation which deals with a right to a judicial decision. . . . The effect, if it is valid, is to deprive the subject of the right to the market value of his goods given him by the above-named statutes, and further to deprive him of any legal right to compensation, while giving him permission to go to the Losses Commission and ask for some *ex gratia* payment by reason of interference with his property or business.

" This part of the regulation is *ultra vires*. I do not think that a regulation which takes away the subject's right to a judicial decision, or transfers the adjudication of his claim, without his consent, from a Court of Law to named arbitrators, can fairly be held to be a regulation for securing the public safety or the defence of the realm, within the meaning of the Defence of the Realm Consolidation Act, 1914. . . .

" The remaining part of the regulation deals with payment. It deprives the owner of the statutory right to the fair market value for his goods, and directs that the sum to be paid shall be based on the cost price. . . . It is plain

that this may deprive the subject of a large part of the sum to which he is entitled by statute, and it authorises the taking for an indefinite period by the Crown of the subject's goods without payment of the pecuniary equivalent at the time of requisition. It is an established rule that a statute will not be read as authorising the taking of a subject's goods without payment, unless an intention so to do is clearly expressed. This rule must *a fortiori* apply to the construction of a statute delegating legislative powers."

HELD: That, the whole of that part of the regulations which had been attacked was *ultra vires* so far as it purported to deprive persons, whose goods were requisitioned by the naval and military authorities, of their right to the fair market value, and to a judicial decision of that amount.

Judgment for the suppliants.

THE TREATY-MAKING POWER OF THE CROWN

XLI. *Walker* v. *Baird and Another*

1892 **[1892] A.C. 491**

This was an appeal from the Supreme Court of Newfoundland. The respondents in this appeal—the plaintiffs in the first instance—owned a lobster factory on the coast of Newfoundland. Her Majesty had entered into a treaty with France that, on the coast of Newfoundland, where the French enjoyed rights of fishing, no lobster factories, which were not in operation on the 1st July, 1889, should be permitted, unless by the joint consent of the Commanders of the British and French Naval Stations. The respondent's lobster factory was one

which under the terms of the treaty had no right to exist. The appellant was the senior officer of the ships of Her Majesty employed on the Newfoundland fisheries, and as such officer it was his duty to enforce the treaty with France. In pursuance of his duties the appellant entered into and took possession of the respondents' factory and the machinery there. The respondents brought an action for trespass against the appellant. The Supreme Court of Newfoundland held that the defence disclosed no answer to the respondents' claim. The appellant appealed.

The appellant based his appeal on the fact that the acts complained of were done by him in pursuance of orders lawfully given him by the Crown. These orders were necessary for the carrying out of an agreement entered into by Her Majesty with a foreign power. Such an agreement was made by Her Majesty by virtue of her prerogative, and in lawful exercise thereof. As such it was binding on the respondents. Orders and acts necessary to carry the same into effect were matters of State, and could not be questioned in any of Her Majesty's Courts. The respondents were working their lobster factory in contravention of the treaty, and in consequence were committing an unlawful act.

The principle involved in the appellant's claim was that the Crown, by its prerogative, can bind its subjects by treaty, that it is an offence by the common law to disobey the provisions of a public treaty of this kind, and that the act of the executive in preventing that disobedience, and enforcing obedience, does not give a cause of action.

Lord Herschell in his judgment said :

" The judgment of the Court below was clearly right. Unless the appellant's acts can be justified on the ground that they were done by the authority of the Crown for the purpose of enforcing obedience to a treaty or agreement entered into between Her Majesty and a foreign power. The suggestion that these acts can be justified as acts of State, or that the Court was not competent to inquire into a matter involving the construction of treaties and other acts of State, is wholly untenable.

" The appellant contends that the power of making treaties of peace is vested by our constitution in the Crown ; and that there must of necessity also reside in the Crown the power of compelling its subjects to obey the provisions of a treaty arrived at for the purpose of putting an end to a state of war. He further contended that if this be so, the power must equally extend to the provisions of a treaty having for its object the preservation of peace. Whether the power contended for does exist in the case of treaties of peace, and if so it exists equally in the case of treaties akin to treaties of peace, or whether in both cases interference with private rights can be authorised otherwise than by the legislature, their lordships did not decide. Their lordships agreed with the Court below that the allegations contained in the statement of defence did not bring the case within the limits of that proposition."

Appeal dismissed.

V

THE PETITION OF RIGHT

It is one of the maxims of our constitutional law that the King can do no wrong. This maxim, which is the result of historical development, finds its origin in the feudal system. It is not derived from any supposed perfection inherent in the sovereign, but from the fact that the King could only be made to answer to a superior for his actions; and, though under the theory of feudal Europe the King was answerable to the Emperor, yet, as the latter's power was not acknowledged in these islands, the King was immune from such jurisdiction and became only answerable to God.

This theory that the King could do no wrong might have become a danger to individual rights and freedom; but from an early age it was settled that though the King could not be held responsible for his actions, for every official act of the Crown some minister was; and for every wrong committed by the executive, some servant of the Crown could be held liable.[1] The King's command has long been held to be no excuse for a wrongful act; the personal liability of the Crown's servants for their actions has

[1] See Chapter VI.

grown up side by side with the doctrine of the immunity of the Crown, until to-day the ministers of the Crown are accountable for all the actions of the executive ; and the Crown can neither be held responsible for the determination of the general policy of the country, nor for the way in which it is carried into effect, even though this is illegal. It is technically impossible to bring an action against the Crown.

This system has been productive of many satisfactory results, not the least of which is that, while mistakes of government can be visited upon the heads of the Crown servants, their master's position can still remain unshaken. But this complete legal immunity of the sovereign, good as it was from some points of view, operated in many instances to the detriment of the private citizen. In cases where the Crown wrongfully took possession of the subject's lands or goods, the subject had no redress, no means of recovering the property or damages for its loss. To meet this, a custom of petitioning the Crown grew up, and the Crown agreed that the matter in dispute should be referred to the Courts of Law. Thus arose the Petition of Right.

The subject petitions the Secretary of State for the Home Department for leave to sue the Crown ; and the King, acting on the advice of the Home Secretary, either gives or withholds his fiat to bring the action. Once the fiat of the Crown has been obtained the action proceeds as if it were an action between private citizens, and judgment can be given against the Crown. In this latter case the Crown

always carries the judgment into effect though the supplicant is powerless to enforce it. This procedure is regulated by statute, the Petition of Right Act, 1860.

In this way the individual has a means of obtaining redress from the Crown, but neither the Petition of Right Act, nor the fact that the Crown's fiat is generally given, and the decision of the Court carried out, gives any would-be petitioner a right to sue the Crown. The granting of the fiat is a matter within the discretion of the Crown, and the fact that the fiat is refused, on the advice of the Home Secretary, gives no right of action against him.[1] The case is different in some of the Dominions, where the Crown can be sued under a local statute.

The ground covered by the Petition of Right has grown as the result of the judicial decisions of the last century. At first it could only be brought to recover land or goods wrongfully detained by the Crown. It then widened to cover claims for breaches of contract where the loss suffered resulted in liquidated damages; and now, since 1874, it can be brought to recover unliquidated damages.[2] Through this machinery the Crown can in effect be sued for breach of contract, but it does not follow that an action can be successfully maintained in every case where an action would lie against an ordinary individual. The Crown cannot enter into every form of contract so that it is enforceable; it has been held that the Crown cannot bind its future executive action.[3] [4]

[1] Irwin *v.* Grey, XLII. [2] Thomas *v.* The Queen, XLIV.

[3] Dunn *v.* The Queen, LV.

[4] Rederiaktiebolaget Amphitrite *v.* The King, XLV.

Efforts have made to increase the scope of the Petition of Right by giving the subject power to bring an action against the Crown for damages for tort.[1] This extension has always been refused, for the Crown, being incapable of doing wrong, is essentially incapable of committing a tort, a cause of action founded on wrong. As a necessary consequence it is not liable for the torts of its agents.[2] In this latter case the only redress the subject has is against the Crown servant who actually committed the wrong, and who is always liable. In some of the colonies however, the Crown, under local statutes, can be sued for tort.[3] Certain government departments also are exceptions to the general rule, and under various statutes they are under a liability to sue and be sued by the ordinary modes of procedure.

THE PETITION IS NOT GRANTED AS OF RIGHT

XLII. *Irwin* v. *Grey*

1863 **3 F. & F. 635**

This was an action against the Home Secretary for not submitting to Her Majesty a Petition of Right, presented by the plaintiff under Bovill's Petition of Right Act (23 and 24 Vict. c. 34). Section 2 of this Act provides that : " the petition shall be left with the Secretary of State for the Home Department, in order that the same may be submitted to Her Majesty for Her Majesty's gracious consideration, and in order that Her Majesty, if she

[1] Feather *v.* The Queen, XLVIII.

[2] Viscount Canterbury *v.* The Attorney-General, XLVI.

[3] Farnell *v.* Bowman, XL.

shall think fit, may grant her fiat that right be done." The defendant, in giving evidence stated that he had submitted the petition to Her Majesty but that he had not advised her to grant her fiat. The plaintiff proposed to show that this did not amount to a submission of the Petition of Right to Her Majesty within the Act, owing to the fact that the defendant had not advised her to grant her fiat. Erle, C.J., held this could not be gone into and directed a verdict for the defendant.

The plaintiff appealed on the ground of misdirection. HELD : that under the statute it was the duty of the Secretary of State to examine the Petition of Right and to give his advice upon it, as to whether a cause of action against the Crown arose ; and he having done so, no action lay. The direction was quite right. The only question was whether the defendant had submitted the Petition of Right. The advice he gave ought not to have been divulged.

THE RECOVERY OF A LIQUIDATED DEBT FROM THE CROWN

XLIII. *The Bankers' Case*

1690 **14 St. Tr. 1**

The Bankers had lent Charles II. various sums of money on the security of the public revenue. Interest was punctually paid for some years, but in 1671 the King closed the Exchequer and all payments stopped. In 1677 Charles, by letters patent under the Great Seal, granted the Bankers annuities in fee at the rate of six per cent. on the moneys detained. These moneys were charged on the heredi-

tary revenue of the Excise. No pains were spared to make the letters patent as binding as possible, and they contained a covenant from the King for himself, his heirs and successors, that due payment should be made. These annuities were paid until 1683, when all payments again ceased until the Revolution, when a petition was presented to the Barons of the Exchequer for payment of arrears of the annuities.

Two questions arose.

(1) Whether the grant of the King was good so as to bind his successors and continue a charge upon the revenue ?

(2) Whether the petitioners had adopted a proper remedy ?

HELD : firstly, that the grant was good and bound the Crown ; secondly, that a proper remedy had been adopted by the petitioners. Lord Keeper Somers dissented from this latter decision on the ground that the only remedy was by petition to the King himself.

(A Petition of Right is now the correct form of procedure.)

THE RECOVERY OF AN UNLIQUIDATED DEBT FROM THE CROWN

XLIV. *Thomas* v. *The Queen*

1874 **10 Q.B. 31**

Thomas applied by Petition of Right for unliquidated damages for breach of contract. The suppliant had invented a new form of artillery. He had incurred heavy expenses in perfecting his invention ;

and Her Majesty's Government had agreed that: if the suppliant would show his plans, and if certain tests were successful, his expenses should be repaid, and, in the event of the new artillery being adopted for Her Majesty's service, a reward should be given to the plaintiff. The amount of such reward was to be determined by the Master-General and Board of Ordnance. The required tests had been satisfied and the new artillery had been adopted, but neither of the two promises made on behalf of the Queen had been fulfilled.

The Crown demurred to the petition, on the ground that a Petition of Right did not lie in such a case. This argument was entirely grounded on the absence of all precedents. No precedent could be found in which the remedy by petition was not confined to cases in the nature of a real action to recover land. The remedy was alleged to be limited to where redress could be granted by an order to the King's officers to withdraw, and not to extend to cases where, if the King's officers did not choose to pay, there could be no effectual relief unless the King's treasure, or lands and chattels, were taken in execution. The only exception was the Bankers' Case, where a Petition of Right was not brought.

HELD: on the authority of the *Bankers' Case*[1] that judgment on the demurrer should be for the suppliant.

[1] See p. 95.

THE PETITION DOES NOT LIE FOR THE BREACH OF AN ARRANGEMENT WHICH THE CROWN IS ENTITLED TO VARY IN THE INTERESTS OF THE NATION.

XLV. *The Rederiaktiebolaget Amphitrite* v. *The King*

1921 | [1921] **3 K.B. 500**

This was a Petition of Right to recover damages from the Crown for alleged breach of contract.

The suppliants were a Swedish shipowning company. In 1918, being aware of the liability of neutral ships to be detained in British ports, the Company obtained a guarantee from the British Legation at Stockholm that in the event of their ship *Amphitrite* being put in trade between Sweden and England, she would be allowed a free passage without being detained in Great Britain. The British Legation had, after consulting the proper authorities, given the required guarantee. After one voyage the undertaking was renewed in respect of a second voyage. The *Amphitrite* on the faith of this undertaking sailed to Hull. After she had discharged her cargo clearance was refused to enable her to leave this country. The suppliants had to sell the *Amphitrite* to avoid further loss and presented this petition claiming damages.

Rowlatt, J., in giving judgment said :

" Under these circumstances what I have to consider is whether this was a contract at all. . . . I have not to consider whether what the Government did was morally wrong or arbitrary. All I have got to consider is whether there was an enforceable contract, and I am of opinion

that there was not. No doubt the Government can bind itself, through its officers, by a commercial contract, and if it does so it must perform it like anybody else or pay damages for the breach. But this was not a commercial contract; it was an arrangement whereby the Government purported to give an assurance as to what its executive action would be in the future in relation to a particular ship, in the event of her coming to this country with a particular kind of cargo. And that is, to my mind, not a contract for the breach of which damages can be sued for in a Court of Law. It was merely an expression of intention to act in a particular way in a certain event. My main reason for so thinking is that it is not competent for the Government to fetter its future executive action, which must necessarily be determined by the needs of the community when the question arises. It cannot by contract hamper its freedom of action in matters which concern the welfare of the State. Thus in the case of the employment of public servants, which is a less strong case than the present, it has been laid down that, except under Act of Parliament, no one acting on behalf of the Crown has authority to employ any person except upon the terms that he is dismissable at the Crown's pleasure.[1]

" I am of opinion that this petition must fail and there must be judgment for the Crown."

Judgment for the Crown.

THE PETITION OF RIGHT DOES NOT LIE FOR TORT

XLVI. *Viscount Canterbury* v. *The Attorney-General*

1843 **1 Phill. 306**

This was a Petition of Right in which the petitioner claimed damages from the Crown for loss occasioned by the negligence of the Crown's servants.

[1] See p. 114.

The petitioner was Speaker of the House of Commons, and as such occupied a house forming part of the Palace of Westminster. In 1834 the Royal Exchequer tallies were ordered to be burnt ; the Crown servants were so negligent in putting the tallies in the stoves of the House of Lords that a fire broke out, which extended to the Speaker's house, causing loss and damage to him of about £10,000. The petitioner prayed that his loss might be made good to him. The Attorney-General demurred to the petition on the ground that the petitioner could find no authority to show that a petition had ever been brought to recover damages for a wrongful act alleged to have been committed by the Crown or its servants.

In the judgment it was said :

> " It is admitted that for the personal negligence of the sovereign, neither this nor any other proceeding can be maintained. Upon what ground then can an action be supported for the acts of the agent or servant ? If the master is liable upon the principle that *qui facit per alium facit per se*, this would not apply to the sovereign, who cannot be required to answer for his own personal acts. If it be said that the master is answerable for the negligence of his servant, because it may be considered to have arisen from his own misconduct or negligence in selecting or retaining a careless servant, that principle cannot apply to the sovereign to whom negligence or misconduct cannot be imputed, and for which, if they occur in fact, the law affords no remedy."

Demurrer of the Attorney-General allowed.

XLVII. *Tobin* v. *The Queen*

1864 **1864. 16 C.B.N.S. 310**

This was a Petition of Right to recover compensation for a wrongful act done by a servant of the Crown in the supposed performance of his duty.

The suppliant had a vessel engaged in the African coastal trade. Captain Douglas, the commander of one of Her Majesty's ships engaged in the suppression of the slave trade, had wrongfully seized the petitioner's vessel and sunk it. He did this on the ground that it was engaged in the slave trade, and owing to its condition it was impossible to take it into port for condemnation by the Vice-Admiralty Court. The vessel was not engaged in the slave trade—the suppliant petitioned the Crown for compensation.

Erle, C.J., in delivering judgment said :

" The petition shows a wrong for which an action might lie by the suppliant against Captain Douglas ; but we are of opinion that it does not show a complaint in respect of which a Petition of Right can be maintained against the Queen, and for this opinion we rely on these grounds : firstly, that Captain Douglas, in seizing the vessel, was not acting in obedience to a command of Her Majesty, but in the supposed performance of a duty imposed upon him by Act of Parliament ; secondly, if it be assumed that he was an agent employed by the Queen to seize vessels engaged in the slave-trade, that he was not acting within the scope of his authority in seizing a ship not engaged in the slave-trade, and for that reason did not make his principal liable for a seizure made without authority from that principal ; thirdly, that a Petition of Right cannot be maintained to recover unliquidated damages for trespass. . . .

"The maxim that the King can do no wrong is true in the sense that he is not liable to be sued civilly or criminally for a supposed wrong. That which the sovereign does personally, the law presumes will not be wrong; that which the sovereign does by command to his servants, cannot be a wrong in the sovereign, because if the command is unlawful it is in law no command, and the servant is responsible for the unlawful act, as if there had been no command.

"Throughout the authorities no mention is made of a remedy against the King for compensation in damages. Against him the redress to be obtained is restitution only. If damages are sought they are to be obtained, if at all, from the officer who did the wrong."

Judgment for the Crown.

XLVIII. *Feather* v. *The Queen*

1865 **1865. 6 B & S. 257**

This was a Petition of Right by which the suppliant sought to recover damages for an infringement of patent rights by the Crown. The suppliant was the inventor of certain improvements for warships, and by letters patent the sole right of making this invention was granted to him for fourteen years. Notwithstanding the patent, the Admiralty used the invention without the consent of the patentee. For this user by the Crown, the suppliant claimed £10,000 damages.

The Attorney-General, on behalf of the Crown, demurred to the petition on two grounds. Firstly, on the ground that patents of this kind were not good against the Crown so as to exclude the Crown from the use, except with the assent of the patentee, of the invention protected by the patent. Secondly,

on the ground that the Crown was not liable on a Petition of Right for the infringement of a patent right ; and that the suppliant's remedy, if any wrong had been done him, was by action against those who did it, in this case the Lords of the Admiralty.

Cockburn, C.J., gave judgment for the Crown on the first question arising on the demurrer, and continued:

" It may appear unnecessary to express any opinion on the second point, namely, whether a Petition of Right can be brought against the Crown in respect of an alleged wrong. Nevertheless, on account of the importance of the question, we think it right to state that we can see no reason for dissenting from the conclusion arrived at by the Court of Common Pleas in the case of *Tobin* v. *The Queen*.[1] We concur with that Court in thinking that the only cases in which a Petition of Right is open to the subject are, where the land or goods or money of a subject have found their way into the possession of the Crown, and the purpose of the petition is to obtain restitution, or, if restitution cannot be given, compensation in money, or where the claim arises out of contract as for goods supplied to the Crown or the public service. . . .

" Not only is there no precedent for a Petition of Right being entertained in respect of a wrong in the legal sense of the term, but, if the matter is considered with reference to principle, it becomes apparent that the proceeding by Petition of Right cannot be resorted to by the subject in the case of a tort. The Petition of Right, unlike a petition addressed to the grace and favour of the sovereign, is founded on the violation of some right in respect of which, but for the immunity of all process with which the law surrounds the sovereign, a suit at law or equity could be maintained. The petition must therefore show upon the face of it some ground of complaint which, but for the inability of the subject to sue the sovereign, might be

[1] See page 101.

made the subject of a judicial proceeding. Now, apart from the question of procedure, a Petition of Right in respect of a wrong, in the legal sense of the term, shows no right to legal redress against the sovereign. For the maxim that the King can do no wrong applies to personal as well as to political wrongs; and not only to wrongs done personally by the sovereign, if such a thing can be supposed to be possible, but to injuries done by a subject by the authority of the sovereign. . . .

"Let it not, however, be supposed that a subject sustaining a legal wrong at the hands of a minister of the Crown is without a remedy. As the sovereign cannot authorise a wrong to be done, the authority of the Crown would afford no defence to an action brought for an illegal act committed by an officer of the Crown. . . . In our opinion no authority is needed to establish that a servant of the Crown is responsible in law for a tortious act done to a fellow subject, though done by the authority of the Crown—a position which appears to us to rest on principles which are too well settled to admit of question, and which are alike essential to uphold the dignity of the Crown on the one hand and the rights and liberties of the subject on the other."

Judgment for the Crown.

[By the Patents and Designs Act, 1907, S. 29, it has been enacted that a patent shall have the same effect against the Crown as against the subject.]

THE STATUTE OF LIMITATIONS DOES NOT APPLY TO THE CROWN

XLIX. *Commissioners of His Majesty's Works and Public Buildings* v. *Pontypridd Masonic Hall Company, Limited.*

1920 **[1920] 2 K.B. 233**

The plaintiffs had taken the defendants' hall on

an annual tenancy, determinable on six months' notice, for use as a hall for County Court purposes. In 1904 the use of the hall was given up, but no notice was given to terminate the tenancy, and by inadvertence the plaintiffs continued to pay rent until 1916. The plaintiffs contended that the tenancy was surrendered by operation of law in 1904, and claimed to recover the amount of the rent paid since that date to 1916.

The defendants denied that there had been any surrender and relied upon the Statute of Limitations.

HELD: that firstly, there was a surrender by operation of law; and secondly, as the plaintiffs were suing as servants and agents of the Crown, the Statute of Limitations did not apply. The principle being that where the Crown is not named in a statute it is not bound thereby, and therefore the Statute of Limitations does not apply as against the Crown.

Judgment for the plaintiffs.

THE PETITION OF RIGHT IN THE COLONIES.

L. *Farnell* v. *Bowman*

1887 **12 A.C. 643**

This was an appeal from a judgment of the Supreme Court of New South Wales in an action by the respondent, as plaintiff, against Farnell, who was sued as the nominal defendant on behalf of the Colony. The plaintiff claimed damages for the negligence of the Government's servants in lighting fires adjacent to the plaintiff's land, which spread to the plaintiff's land, and burned the grass and fencing.

The defendant demurred, alleging that the Government was not liable to be sued in an action of tort. This demurrer was overruled on the ground that the New South Wales Act, 39 Vict. No. 38, created a right of action against the Government for damages *ex delicto* as well as *ex contractu*, and it was ordered that judgment should be entered for the plaintiff on the defendant's demurrer. From that order the defendant appealed.

HELD: that, under the provisions of the Act, 39 Vict. No. 38, of the Colonial Legislature, the Government of the Colony is liable to be sued in an action of tort. In the course of the judgment Sir Barnes Peacock said:

> "It must be borne in mind that the Local Government in the Colonies, as pioneers of improvements, are frequently obliged to embark on undertakings which in other countries are left to private enterprise, such, for instance, as the construction of railways, canals, and other works for the construction of which it is necessary to employ many inferior officers and workmen. If, therefore, the maxim that 'the King can do no wrong' were applied to Colonial Governments in the way now contended for by the appellants, it would work much greater hardship than it does in England."

Appeal dismissed.

VI

THE RIGHTS AND LIABILITIES OF SERVANTS OF THE CROWN

The servant of the State in England stands in the same legal position as the servant of the ordinary citizen. The law neither places him under obligations, nor grants him immunities, different from those imposed upon his fellow subject. What Professor Dicey calls the " rule of law " results in a position totally different to that in continental nations. The state official abroad is governed by a special body of law called *droit administratif*, which confers on such officials especial rights and liabilities, regulates their position in regard to the private citizen, and finally lays down a particular procedure for enforcing these rights and duties. Such a conception of the position of the servant of the State is entirely alien to the working of the English constitution. The common law, having laid down the maxim that " the King can do no wrong," protected the subject by making every servant of the Crown liable for the crimes or wrongs he does, whether committed on his own initiative or under the orders of a superior.

Since the Crown can only act through its ministers, and every act of government, before it is valid, must

pass through the hands of some Crown servant, who is legally responsible for it, every action of the Crown is brought within the jurisdiction of the Courts, without the Crown itself being touched. This liability of ministers prevents the legal immunities of the Crown working to the detriment of the private citizen.

Matters of high policy, public security, or which touch on affairs of international importance, acts which in foreign countries are left to the uncontrolled discretion of the executive and over which their Courts have no jurisdiction, are here, like every other act of the Crown's servants, subject to the supervision of the ordinary law. Such so-called acts of State are no excuse for a legal wrong. The only act of State which the law recognises as an exception to the rule is an injury to a foreigner, committed outside the jurisdiction of the Courts—which act is either ordered, or subsequently adopted, as an act of State by the Crown. In such circumstances the person wronged has no right to seek redress from the Courts but must proceed by diplomatic means.[1]

Crown servants are not personally liable for contracts entered into on behalf of the Crown.[2] For the breach of such contracts the injured individual can only take action against the sovereign itself by Petition of Right. Such servants contract as agents, and though they can of course make themselves legally responsible, in all ordinary circumstances they are not liable, even though, by the terms of the contract they would be bound if it were an agency of a private nature.[3]

[1] Buron *v.* Denman, LXVII. [2] Macbeath *v.* Haldimand, LI.
[3] Dunn *v.* Macdonald, LII.

Crown servants are liable for all the torts they commit in the course of their employment, but they are not liable for the wrong-doings of their subordinates,[1] nor is an inferior official protected in a breach of the law if he acts on the orders of a superior. The upper and lower grades of state official are all equally servants of the Crown, and not of each other. Hence, the Lords of the Admiralty cannot be held responsible for the trespasses of those in the employ of the Navy unless they did in fact order the act complained of.

The naval and military servants of the Crown are in a different position to the civil servants, while they are subject to the same liabilities, they have not always the same rights. The civil servant can apply for redress of grievances against his superior to the ordinary Courts, but those in the military employment of the Crown are bound by military law, and must apply to military tribunals when they have been injured, if the act complained of arises out of military duty. The extent to which the jurisdiction of the ordinary Courts is ousted is still uncertain, though such Courts have certainly jurisdiction where the act complained of is done in excess of, or in the absence of, military jurisdiction; but where the alleged wrong is done in exercise of the jurisdiction conferred by the Army Act, even if it is done maliciously and without reasonable and probable cause, it is doubtful whether the Courts have jurisdiction to investigate the matter.[2]

Crown servants, both civil[3] and military,[4] are

[1] Raleigh *v.* Goschen, LIII.
[2] Heddon *v.* Evans, LX.
[3] Dunn *v.* The Queen, LV.
[4] Mitchell *v.* The Queen, LVIII.

engaged during the pleasure of the Crown notwithstanding any terms of their contract of employment. This rule is based on the principle that it is for the public good that such contracts should be determinable at will, and is applicable to Colonial Crown servants, unless the rule has been altered by local statutes.[1]

Colonial governors, being servants of the Crown, have the same rights and duties, and are subject to the same liabilities as its other servants. Various governors have tried to establish a general immunity, criminal as well as civil, from the jurisdiction of the Courts, both for their private acts and their acts as governor, but this claim has never been upheld. They are liable to be sued both here [2] and in their colony.[3] By 11 and 12 Wm. c. 12 especial provision is made for the trial and punishment in this country of offences committed by governors in their colonies.

A governor's powers are limited to those conferred on him by his commission. He has not delegated to him the whole sovereign power, and the Courts can inquire whether any act is within the authority given him, and award damages against him, if the act complained of is not within it.[4] The governor cannot remove his actions from the jurisdiction of the local Courts by declaring them to be acts of State.

A Viceroy is in a more privileged position than a governor. He is not so much a servant of the Crown, as the representative of the sovereign. He stands

[1] Gould *v.* Stewart, LVII.
[2] Mostyn *v.* Fabrigas, LXIII.
[3] Hill *v.* Bigge, LXIV.
[4] Musgrave *v.* Pulido, LXII.

in the place of the King and enjoys to some extent similar immunities from the jurisdiction of the Courts.[1]

LIABILITY FOR CONTRACTS ENTERED INTO ON BEHALF OF THE CROWN

LI. *Macbeath* v. *Haldimand*

1786 **1 T.R. 172**

The defendant was Governor of Quebec, and had ordered from the plaintiff various military stores for use in the public service. The plaintiff applied to the treasury for payment, but was refused payment in full, on the ground of his extortionate charges. He then brought this action against the defendant for the remainder of his money.

Held: that the defendant was not personally liable. The goods were furnished for the use of the Crown; and no individual was answerable for the engagements he entered into on behalf of the Crown.

Judgment for the defendant.

LII. *Dunn* v. *Macdonald*

1897 **[1897] 1 Q.B. 555**

The defendant was Her Majesty's Consul-General for the Niger Protectorate. He engaged the plaintiff as a servant of the Crown for three years certain. The plaintiff was dismissed before the end of the three years. This was an action against the defendant for damages for breach of warranty, based on the ground that the defendant had untruly repre-

[1] Tandy *v.* The Earl of Westmoreland, LXVI.

sented and warranted to the plaintiff that he was duly authorised and empowered to engage the plaintiff for the service, and on behalf of the Crown, for three years certain.

HELD: that no action will lie against a public servant upon any contract which he makes in that capacity. The liabilities of public agents, on contracts made by them in their public capacity, are on a different footing from the liabilities of ordinary agents on their contracts. In the former case, unless there is something especial which would be evidence of an intention to be personally liable, an agent acting on behalf of a government is not liable for breach of a contract made in his public capacity, even though he would by the terms of the contract be bound if it were an agency of a private nature.

LIABILITY FOR TORTS COMMITTED IN THE SERVICE OF THE CROWN

LIII. *Raleigh* v. *Goschen*

1898 **[1898] 1 Ch. 73**

This was an action for trespass against the Lords of the Admiralty in their official capacity. The plaintiff was the owner of land which the Admiralty desired to purchase; negotiations for sale broke down, and, under certain alleged statutory powers, servants of the defendants entered on the land and surveyed it.

The plaintiff claimed damages for this trespass and an injunction to restrain further trespass.

The defendants submitted that the Court had no jurisdiction to entertain the action.

Romer, J., in giving judgment said :

" It appears to me that if any person commits a trespass he cannot escape liability for the offence, he cannot prevent himself being sued, merely because he acted in obedience to the order of the executive Government, or of any officer of State ; and it further appears to me that if the trespass had been committed by some subordinate officer of a Government Department or of the Crown, by the order of a superior official, that superior official—even if he were the head of the Government Department—could be sued ; but in such a case the superior official would be sued, not because of, but despite of, the fact that he was an officer of State.

" I think it is clear that the head of a Government Department is not liable for the neglect or torts of officials in the Department, unless it can be shown that the act complained of was substantially the act of the head himself ; in which case he would be liable as an individual, just as a stranger committing the same act would be. . . .

" To sum up, the plaintiffs can sue any of the defendants individually for trespasses committed or threatened by them, but they cannot sue the defendants officially or as an official body. It is not suggested that the defendants themselves have done this. This action is one against the defendants in their official capacity. It follows that the present action is misconceived and will not lie."

Action dismissed.

A SERVANT OF THE CROWN IS NOT LIABLE FOR THE TORTS OF HIS SUBORDINATES

LIV. *Lane* v. *Cotton*

1701 **1 Ld. Raym. 646**

The plaintiff brought an action on the case against the defendant as Postmaster-General. The plaintiff had delivered a letter to the Post Office and one of

the subordinate officials had opened the letter and stolen some exchequer bills.

HELD: that the head of a public office under Government with power to appoint and remove the servants of the office, who are paid by, and give at his discretion security to the Government, is not responsible to an individual for loss occasioned by the default of such servants. The servant who is guilty of such offence is. The Postmaster-General is not personally liable for a packet lost out of his office.

In the course of judgment it was said:

> "The Postmaster has not the power of the management of the office according to his discretion, but is subject to the control of the King and of the Treasury. And because the inferior officers are servants of the King, and not of the defendant, their wages being paid to them out of the revenue of the Post Office, and security taken of them in the name of the King, therefore it is unreasonable that the defendants should be answerable for the acts of their inferior officers."

CROWN SERVANTS ENGAGED DURING THE PLEASURE OF THE CROWN

LV. *Dunn* v. *The Queen*

1896 **[1896] 1 Q.B. 116**

This was a Petition of Right for damages for breach of contract. Her Majesty's Commissioner and Consul-General of Nigeria, acting on behalf of the Crown, had engaged the suppliant in the service of the Crown, as consular agent in that region, for three years certain. The suppliant claimed damages

for having been dismissed before the expiration of that period.

The learned judge in the Court of first instance held that the contracts for the service of the Crown were determinable at the pleasure of the Crown, and gave judgment for the Crown.

The suppliant appealed.

HELD on appeal: that the Commissioner for Nigeria had no power to appoint a subordinate officer for a definite time, so as to bind the Crown not to dismiss him before that time expired. Such appointment in the service of the Crown being for the good of the public, it was essential for the public good that it should be capable of being determined at the pleasure of the Crown ; except in certain exceptional cases, where it had been deemed to be more for the public good that some restriction should be imposed on the power of the Crown to dismiss its servants. Both on authority and principle it was clear the petitioner was not entitled to succeed.

Application dismissed.

THE RIGHTS OF THE SERVANTS OF THE CROWN IN THE COLONIES

LVI. *Shenton* v. *Smith*

1895 **[1895] A.C. 229**

This was an appeal from an order of the Supreme Court of Western Australia.

Dr. Smith had been engaged in the service of the Government of Western Australia during the temporary absence of another doctor. Before that doctor returned the Government dismissed Dr.

Smith, who claimed damages on the ground of wrongful dismissal. Dr. Smith was awarded damages in the Court below, and Shenton, who represented the Government, appealed.

HELD: that, unless in special cases where it is otherwise provided, servants of the Crown hold their offices during the pleasure of the Crown: not by virtue of any special prerogative of the Crown, but because such are the well known terms of their engagement. If any public servant considers that he has been dismissed unjustly, his remedy is not by a suit of law, but by an appeal of an official or political kind. Further, HELD: that a Colonial Government is on the same footing as the Home Government, as to the employment and dismissal of its servants.

Appeal allowed.

LVII. *Gould* v. *Stewart*

1896 **[1896] A.C. 575**

This was an appeal from an order of the Supreme Court of New South Wales.

The respondent entered into the service of the Government of New South Wales under, and in accordance with, the provisions of the Civil Service Act, 1884, of that colony. Before his service had been determined in a manner prescribed by the Act, the Government dismissed him. The respondent brought an action against the appellant, the nominal defendant on behalf of the Government, for damages for the dismissal, and he was awarded £1500 damages against the Government. The Government appealed on the ground that the Act did not create

any exception to the rule that civil servants of the Crown held office only during pleasure.

HELD: That the terms of the Civil Service Act, 1884, were manifestly intended for the protection and benefit of the officer, and were inconsistent with importing into the contract of service the term that the Crown may put an end to it at its pleasure. In that case they would be superfluous, useless, and delusive. This was, in their Lordships opinion, an exceptional case in which it had been deemed for the public good that a civil service should be established under certain regulations, and with some qualification of the members of it, and that some restriction should be imposed on the power of the Crown to dismiss them.

Appeal dismissed.

THE RELATION OF THOSE IN MILITARY SERVICE TO THE CROWN

LVIII. *Mitchell* v. *The Queen*

1896 **[1896] 1. Q.B. 121 note**

This was an appeal from a demurrer to a Petition of Right.

By Royal Warrant it was provided that certain army officers, retiring after five years' service, should be entitled to be placed on half pay or to receive similar compensation. The suppliant retired in accordance with the regulations and was awarded compensation, but he alleged that the compensation awarded was not based on that provided by the Royal Warrant, and prayed for a further amount by way of compensation.

HELD: that it had long been decided that all engagements between those in the military service of the Crown and the Crown are voluntary only on the part of the Crown, and give no occasion for an action in respect of any alleged contract. Further that whatever means of redress an officer might have in respect of a supposed grievance, he cannot, as between himself and the Crown, take proceedings in the Court of Law in respect of anything which has happened between himself and the Crown in consequence of his being a soldier. No engagement between the Crown and any of its military or naval officers in respect of services either present, past, or future can be enforced in any court of law.

Petition dismissed.

[In *Leaman* v. *The King* ([1920] 3 K.B. 663) it was held: that the rule that all engagements between those in the military service of the Crown and the Crown, are voluntary only on the part of the Crown, applies, as well to private soldiers, as to officers.]

POWER OF AN OFFICER TO LEAVE THE SERVICE OF THE CROWN

LIX. *Hearson* v. *Churchill*

1892 **[1892] 2 Q.B. 144**

This was an action to recover damages for illegal arrest and imprisonment. The plaintiff was a naval engineer and had accepted a commission in the Royal Navy. He served in the navy for some years until he was offered an appointment in China, when he wrote to the Admiralty asking that his resignation might be accepted. This application was refused—

the plaintiff then, having obtained leave of absence from his ship, set sail for China. The Admiralty treated him as a deserter, and when he went ashore at Singapore he was arrested and sent back to England. The plaintiff alleged that he had a right to resign, and claimed damages for his arrest and imprisonment.

HELD : that the plaintiff's commission was not on the footing of a contract, but depended upon the prerogative rights of the sovereign. These rights were regulated by the Naval Discipline Act, 1866, and under the provisions of that Act under no circumstances was a naval officer entitled to resign his commission except by permission of Her Majesty.

Appeal dismissed.

THE CONTROL OF NAVAL AND MILITARY TRIBUNALS BY THE CIVIL COURTS

LX. *Heddon* v. *Evans*

1919 **1919 35 T.L.R. 642**

The plaintiff in this action was a private in the army, and he claimed damages for alleged slander, false imprisonment, and malicious prosecution from his former commanding officer, the defendant.

The defendant had caused the plaintiff to be arrested, had convicted him upon various charges, and had sentenced him to 14 days confinement to barracks. The plaintiff alleged that the detention was illegal, but that, even if the defendant acted within the bounds of his jurisdiction, he was guilty of abusing his authority, maliciously and without reasonable and probable cause.

The whole of the alleged injuries sprang directly and solely from the military relationship which existed between the plaintiff and the defendant. The defendant submitted that consequently the action would not lie. The district registrar dismissed the action, and the plaintiff appealed.

The defence was based on the judgment in *Dawkins* v. *Lord Rokeby*,[1] following the decision in *Sutton* v. *Johnson*,[2] which laid down that a case involving questions of military duty alone is cognisable only by a military tribunal and not by a Court of Law.

McCardie, J., in delivering judgment laid down two conclusions based upon the earlier decisions :

> (1) A military tribunal or officer will be liable to an action for damages, if when acting in excess of, or without jurisdiction, it or he does, or directs to be done, to a military man, whether officer or private, an act which amounts to assault, false imprisonment, or other common law wrong, even though the injury purports to be done in the course of actual military discipline.
>
> (2) If the act causing the injury to person or liberty be within the jurisdiction, and in the course of military discipline, no action will lie upon the ground only that such act has been done maliciously and without reasonable and probable cause.

It followed that his Lordship was free to inquire whether the defendant acted without jurisdiction, and whether he falsely imprisoned the plaintiff, and if he did, to award damages ; but that he was not free to award damages to the plaintiff for malicious and groundless abuse of authority.

HELD : that the defendant did not act beyond his

[1] 4 F. and F. 806. [2] I.T.R. 493.

jurisdiction in respect of the matters complained of, neither did he act maliciously or without reasonable and probable cause.

Judgment for the defendant.

THE POSITION OF A COLONIAL GOVERNOR

LXI. *Cameron* v. *Kyte*

1835 **1835 3 Knapp P.C.C. 332**

The appellant had bought an estate in the Colony of Berbice, and the respondent claimed a commission of five per cent. on the purchase price. The claim was based on the fact that the respondent was the Vendue Master of the island, an officer whose duty it was to supervise the sale of all property by auction on the island. By various resolutions of the Dutch West India Company passed in 1735 and 1745, the Vendue Master was given a commission of five per cent. on all property sold. From the English conquest of the island in 1803, until 1810, this ancient rate continued to be paid. In 1810 the Governor of the island made a notification, or proclamation, reducing the amount payable from five to one-half per cent. When the appellant bought his estate by auction he refused to pay the Vendue Master's commission at the higher rate, and the respondent brought an action to recover the full five per cent., on the ground that the Governor possessed no legislative powers to originate, or vary the laws of the colony, and the notification was invalid. The Supreme Court of the colony found in favour of the Vendue Master, and the appellant appealed from the order.

Parke, B., in delivering judgment said :

" If a Governor had, by virtue of that appointment, the whole sovereignty of the colony delegated to him as a Viceroy, and representative of the King in the government of that colony, there would be good reason to contend that an act of sovereignty done by him would be valid and obligatory upon the subject living within his government, provided the act would be valid if done by the sovereign himself, though such an act might not be in conformity with the instructions which the Governor had received for the regulation of his conduct. The breach of these instructions might well be contended on this supposition to be a matter resting between the sovereign and his deputy, rendering the latter liable to censure or punishment, but not affecting the validity of the act done. But if the Governor be an officer, merely with a limited authority from the Crown, his assumption of an act of sovereign power, out of the limits of the authority so given to him, would be purely void, and the Courts of the colony over which he presided could not give it legal effect. We think the office of Governor is of the latter description, for no authority or dictum has been cited before us to show that a Governor can be considered as having the delegation of the whole royal power, in any colony, as between himself and the subject, when it is not expressly given him by his commission. . . .

" The simple act of the Governor alone, unauthorised by his commission, and not proved to be expressly or implicitly authorised by any instructions, is not equivalent to such an act done by the Crown itself."

Judgment of the Court below affirmed.

LXII. *Musgrave* v. *Pulido*

1879 **5 A.C. 102**

This was an appeal from the Supreme Court of Jamaica.

The appellant was Governor of the island, and while Governor he had seized and retained the respondent's schooner. The respondent brought an action for trespass against the Governor, who pleaded that the acts complained of were done by him as Governor of the island, and in the exercise of his reasonable discretion as such, and were acts of State. The respondent demurred to the plea, and the Supreme Court of the Colony allowed the demurrer.

HELD by the Privy Council: that, the Governor of a colony cannot be regarded as a Viceroy; nor can it be assumed that he possesses general sovereign power. His authority is derived from his commission, and limited to the powers therein expressly or impliedly entrusted to him. Let it be granted that, for acts of power done by a Governor, under and within the limits of his commission, he is protected, because in doing them he is the servant of the Crown, and is exercising its sovereign authority; the like protection cannot be extended to acts which are wholly beyond the authority confided to him. Such acts, though the Governor may assume to do them as Governor, cannot be considered as done on behalf of the Crown, nor to be in any proper sense acts of State. When questions of this kind arise, it must necessarily be within the province of the Municipal Courts to determine the true character of the acts done by a Governor; though it may be that, when it is established that the particular act in question is really an act of state policy, done under the authority of the Crown, the defence is complete, and the Courts can take no further cognisance of it

Judgment affirmed.

COLONIAL GOVERNORS ARE LIABLE TO BE SUED

A. IN ENGLAND

LXIII. *Mostyn* v. *Fabrigas*

1774 **1 Cowp. 161**

The defendant was Governor, by letters patent from the Crown, of the island of Minorca, then a British possession. While Governor he first imprisoned and then banished the plaintiff to Carthagena in Spain. The plaintiff brought an action for assault and false imprisonment. The defendant pleaded, firstly, not guilty, and secondly, justification. At the trial the jury found for the plaintiff on both issues, and awarded £3000 damages. The case was argued on error in the King's Bench, on the ground that the defendant, being Governor of Minorca, was not answerable for any injury whatever done by him in that capacity in Minorca.

Lord Mansfield, C.J., giving judgment said :

" If I understand the defendant right, what he says is that the plea of not guilty is immaterial, and so is the plea of justification, because upon the plaintiff's own showing it appears : firstly, that the cause of action arose in Minorca out of the realm ; and secondly, that the defendant was a Governor of Minorca and by virtue of his authority imprisoned the plaintiff. From thence it is argued that the judge who tried the case ought to have refused to hear any evidence whatsoever, and directed the jury to find for the defendant. . . .

" It is impossible that there should exist a doubt but that a subject born in Minorca has as good a right to appeal to the King's Courts as one born within the sound of Bow Bells.

" To repel the jurisdiction of the King's Court over the Governor, you must show another jurisdiction. Now in this case no other jurisdiction is shown ; if the King's Court of Justice cannot hold plea in such a case no other Court can. . . .

" To lay down in an English Court of Justice such a monstrous proposition that a Governor acting by virtue of letters patent under the Great Seal, is accountable only to God and his own conscience, and that he is absolutely despotic and can spoil, plunder, and affect His Majesty's subjects, both in their liberty and property, with impunity is a doctrine which cannot be maintained."

Appeal dismissed.

B. IN THEIR COLONY

LXIV. *Hill* v. *Bigge*

1841 **3 Moo. P.C.C. 465**

Sir George Hill became indebted to Thomas Bigge, a jeweller of the City of London, in the sum of £825. Subsequently he became Lieutenant-Governor of the island of Trinidad. Bigge brought an action in the Courts of Trinidad for the recovery of the debt. Hill entered an appearance under protest, on the ground that he was the Lieutenant-Governor of Trinidad and therefore not liable to be sued in the Courts of the island. Judgment was, however, entered against him.

From this judgment Sir George Hill appealed, and the case was argued before the Judicial Committee of the Privy Council.

HELD : that an action will lie against the Governor of a colony, in the Courts of that colony, while he is such Governor.

Judgment of the Court of Trinidad affirmed.

THE EFFECT OF A COLONIAL INDEMNITY ACT

LXV. *Phillips* v. *Eyre*

1869 **4 Q.B. 225. 6 Q.B. 1**

This was an action for the assault and false imprisonment of the plaintiff in Jamaica. While the defendant was Governor of the island a rebellion broke out there, and martial law was proclaimed. In the course of suppressing the rebellion the assault and imprisonment complained of took place. The defendant pleaded that since these acts took place an Act of Indemnity had been passed by the Colonial Legislature, and afterwards assented to by the Crown. This Act enacted that, the Governor and all persons acting under his authority were thereby indemnified in respect of all matters and things done in order to put an end to the rebellion ; such acts, matters, and things were thereby declared to be lawful and confirmed.

The plaintiff demurred to this plea, and objected that, at the time of the passing of the Act, the defendant was Governor of Jamaica, and was a necessary party to the passing of the Act, and the Act could not have become law without the defendant's consent.

Judgment was given in the Court of Queen's Bench in favour of the defendant on demurrer. The plaintiff appealed, and the Exchequer Chamber held: that the Crown had power to constitute a local legislature in the case of a settled colony, where the inhabitants were entitled to be governed by English law, as well as in the case of a conquered or ceded colony. A confirmed Act of such local

legislature had, as to matters within its competence and the limits of its jurisdiction, the operation and force of sovereign legislation, though subject to be controlled by the imperial Parliament.

The Act in question was not contrary to the principles of English law. The objection that the defendant was personally a necessary party to the Act was invalid. This objection was founded upon a supposed analogy between legislative and judicial proceedings, which was, however, imperfect. The Governor was no more a party to the Colonial Act than the Legislative Council or the House of Assembly, or in legal theory every inhabitant of the island represented therein. If the objection was just in the case of a Governor, then by like reasoning the Crown could derive no benefit from any Act of Parliament; a result alike contrary to reason and experience.

The Colonial Act of Indemnity, even upon the assumption that the Acts complained of were originally actionable, furnished an answer to the action.

Judgment of the Court of Queen's Bench affirmed.

THE POSITION OF VICEROYS

LXVI. *Napper Tandy* v. *The Earl of Westmoreland*

1792 **27 St. Tr. 1246**

In this case the plaintiff sought to bring an action against the defendant, who was Lord-Lieutenant of Ireland. The plaintiff had issued a subpœna against the defendant, who had failed to appear, and then moved to issue a writ of attachment against him. The Attorney-General moved to prohibit the

issuing of any attachment against the defendant and to quash the subpœna. The question before the Court was whether the Lord-Lieutenant might be sued for an act of State.

HELD: That the acts of State done by the Lord-Lieutenant, like those of the King, were all countersigned by responsible ministers, and if he was advised to do anything unconstitutional, the ministers alone were responsible. So long as the defendant occupied his position as Lord-Lieutenant, and was the executive power, he could not be called upon to answer for an act of State.

The motion for the subpœna quashed.

AN ACT OF STATE

LXVII. *Buron* v. *Denman*

1848 **2 Exch. 167**

This was a trial at Bar. The plaintiff was a Spaniard, carrying on the slave trade at Gallinas, where he had a large quantity of slaves. The defendant was a naval commander, stationed on the coast of Africa, with instructions to suppress the slave trade. He was ordered to obtain the liberation of two British subjects detained at Gallinas as slaves. While there, he entered into a treaty for the abolition of the slave trade in that country with the native ruler. In execution of that treaty he fired the barracoons of the plaintiff and carried away his slaves to Sierra Leone, where they were released. Some of the plaintiff's goods used in the slave trade were claimed by the King of the country and delivered up to him, others were destroyed. These

proceedings having been communicated to the Lords of the Admiralty, and the Secretaries of State for the Foreign and Colonial Departments, they respectively adopted and ratified the action of the defendant.

Parke, B., held : that dealers in slaves were not pirates by the law of nations, and could only be made so by and according to the terms of a treaty with the country to which they belong prohibiting the slave trade. Trading in slaves was not a crime by the law of nations ; and if there was a law in a particular country prohibiting the slave trade, it was not open to everyone to punish the offender against the law, but proceedings must be taken in the tribunals of his country. These propositions being clear, the plaintiff had property in his slaves and might maintain trespass for their seizure.

The principal question was whether the conduct of the defendant could be justified as an act of State done by authority of the Crown. As the original act would have been an act of the Crown, if communicated by a written or parol direction from the Board of Admiralty, so this ratification, communicated in the way it had been, was equally good, and this action could not be maintained. This act by adoption became the act of the Crown, the seizure of the slaves and goods by the defendant was a seizure by the Crown, and an act of State for which the defendant was irresponsible, and, therefore, entitled to a verdict on the plea of not guilty.

VII

THE ADMINISTRATION OF JUSTICE

The King is "over all persons in all causes, as well ecclesiastical as civil, within his dominions supreme." He is the fountain of justice, and all Courts administer the law in his name.

Originally the Courts of Law owed their creation to the Crown, but this prerogative has been lost with time, and the Crown cannot now bring into existence a new Court or confer a new jurisdiction on a Court which already exists.[1]

All writs run and procedure throughout the Empire is carried on in the name of the Crown, but the law the King's Courts administer varies completely in different parts of his dominions, as each British possession is for this purpose a separate country with its own private law. The Prize Courts administer international and not municipal law.[2]

The jurisdiction of the Courts extends over all persons and property within the Crown's possessions, with certain few exceptions. By the Territorial Waters Jurisdiction Act, 1878, British sovereignty is declared to extend over the territorial waters for a marine league from the shore, and the King's Bench

[1] *In re* the Lord Bishop of Natal, CIX. [2] The Zamora, LXVIII.

is thereby given a limited jurisdiction in respect of acts done within this area.[1]

The first exemption that the law recognises from its jurisdiction is, as has been shown, that of the sovereign, who cannot be sued by a subject. The only means of obtaining redress from the Crown is by Petition of Right,[2] except where certain government departments have an express statutory power to sue and be sued, as in the case of the War Office.

This immunity of the sovereign does not extend to the Crown's servants.[3] They cannot for purposes of executive government break the law, or justify a wrongful act on the ground that it is an act of State ;[4] nor have the principal executive officers any extraordinary power to issue general warrants to apprehend persons or property.[5]

The second exemption from the jurisdiction of the Court is that possessed by foreign sovereigns. Such sovereigns and their diplomatic agents possess complete immunity, by international law, from the territorial jurisdiction both for their persons and for their property. Nor is this immunity lost if the sovereign is engaged in a trading venture.[6]

A third exemption from the ordinary jurisdiction is that in certain circumstances the rule of law that no man may be punished or imprisoned, except for a breach of the law proved in a legal manner to the satisfaction of the Courts, is liable to be suspended, and gives place to what is called martial law. This is not the same as military law, which derives its

[1] The Queen *v.* Keyn, LXIX. [2] See Chapter V. [3] See Chapter VI.
[4] Entick *v.* Carrington, LXXII. [5] Leach *v.* Money, LXX.
[6] The Parlement Belge, LXXIII.

force from the Army Act and provides for the discipline of the army in time of peace and war, and does not affect civilians.

Martial law can only exist in time of war ; it has been declared to be illegal in time of peace by the Bill of Rights, and depends on the right inherent in the Crown and its servants to maintain public order at whatever cost of life and property. It is a power not particularly vested in military officers, though generally exercised by them, and may be exercised by any person. It can only be justified by the necessities of the case. When martial law is in force extraordinary acts can be done in the public defence.[1]

The question whether such a state of war is in existence as to justify the exercise of martial law and the supersession of the ordinary jurisdiction, is a question of fact. Lord Halsbury goes so far as to lay it down that, when war is actually raging, acts done by the military authorities are not justiceable by the ordinary tribunals.[2] This is a Privy Council decision and so not binding on any English Court, and it has not been followed here, but it has been followed in several recent Irish decisions.

The general trend of opinion seems to be that the ordinary jurisdiction is ousted if war is raging, whether the Courts are sitting or not, if the Courts are satisfied that the military authorities are acting in good faith and are prepared to justify their action ; and that the Courts cannot exercise any jurisdiction which would interfere with military operations, or entertain in such circumstances proceedings against

[1] Tilonko *v.* The Attorney-General of the Colony of Natal, LXXIV.

[2] *Ex parte* D. F. Marais, LXXV.

military or other persons for acts done under so-called martial law.

When war is over the rights of the ordinary tribunals revive, and all acts which have been done under martial law can be reviewed ; in so far as an Act of Indemnity, which in these circumstances is generally passed, has not withdrawn them from such review.

The fourth exemption is that those concerned in the administration of justice enjoy certain privileges and immunities while so engaged.

No action will lie against a judge of one of the superior Courts for a judicial act, though it be alleged to be done maliciously and corruptly. This rule has been laid down to secure the independence of the judges, and to prevent their being harassed by vexatious actions.[1]

All proceedings in Court are privileged, and neither parties, witnesses, counsel, or jury[2] can be made to answer for what is said there, nor can the jury be punished for any verdict they give honestly.[3]

PRIZE COURTS

LXVIII. *The Zamora*

1916 **[1916] 2 A.C. 77**

In 1915 a neutral vessel, bound for Stockholm with a contraband cargo of copper, was stopped at sea by a British cruiser and taken to a British port. Before the cargo was condemned as lawful prize, a

[1] Scott *v.* Stansfield, LXXIX. [2] The King *v.* Skinner, LXXVI.
[3] Bushell's Case, LXXXI.

summons was taken out by the Procurator-General, on behalf of the War Department, to requisition the cargo under Order XXIX of the Prize Court Rules, which were authorised by an Order in Council of 1915. Rule 1 of Order XXIX provided, that if it is made to appear to the judge that it is desirable to requisition property in the custody of the Prize Court, in respect of which no final degree of condemnation has been made, he shall deliver the property to the Crown. The judge of the Admiralty Division of the High Court made an order accordingly. The owner appealed.

The Judicial Committee of the Privy Council laid it down that : the idea that the King in Council, or indeed any branch of the executive, has power to prescribe or alter the law to be administered by Courts of Law in this country is out of harmony with the principles of our constitution. The law which the Prize Court is to administer is not the national, or, as it is sometimes called, the municipal law, but the law of nations—in other words, international law. It is obvious that, if, and so far as, a Court of Prize in this country is bound by and gives effect to Orders of the King in Council, purporting to prescribe or alter the international law, it is administering not international but municipal law.

There is no power in the Crown, by Order in Council, to prescribe or alter the law which Prize Courts have to administer, nor has the Crown such a power where the law is imperfectly ascertained or defined. It does not follow that because Orders in Council cannot prescribe or alter the law to be administered by the Prize Court, such Court will

ignore them entirely. On the contrary, it will act on them in every case where they amount to a mitigation of the Crown's rights in favour of the enemy, or neutral, as the case may be.

HELD: that Order XXIX, R. 1, construed as an imperative direction to the Court, was not binding.

Appeal allowed.

JURISDICTION OVER TERRITORIAL WATERS

LXIX. *The Queen* v. *Keyn*

1876 **2 Ex. D. 63**

Ferdinand Keyn was tried and found guilty at the Central Criminal Court of the manslaughter of Jessie Young. The question for the Court of Crown Cases Reserved was whether the Central Criminal Court had jurisdiction.

Jessie Young was a passenger on board a British steamer, the *Strathclyde*. When off Dover the *Strathclyde* was run into by the *Franconia*, a German steamer under the command and immediate direction of the prisoner. The *Strathclyde* sank and Jessie Young was drowned. The collision occurred within three miles of Dover beach, and was due to the prisoner's negligence.

The prisoner contended that as he was a foreigner, in a foreign vessel, on a foreign voyage, sailing upon the high seas, he was not subject to the jurisdiction of any Court in this country. The Crown maintained that as, at the time of the collision, both vessels were within the distance of three miles from the English shore, the offence was committed within

the realm of England and was triable by an English Court.

The case was argued before thirteen judges, and it was held by seven judges to six that the Central Criminal Court had no jurisdiction to try the prisoner for the offence charged.

The whole majority of the Court held this on the ground that prior to 28 Hen. 8, c. 15, the Admiral had no jurisdiction to try offences by foreigners on board foreign vessels, whether within or without the limit of three miles from the shore, and that subsequent statutes only conferred on the Common Law Courts and the Central Criminal Courts the jurisdiction formerly possessed by the Admiral. There were no precedents for saying the high sea was ever considered to be within the realm. The jurisdiction to try the prisoner was not derived from the common law, or the statute law, or the law of the High Court of Admiralty, and there was no other law which could render the English Court competent. In the absence of statutory enactment the Central Criminal Court had no power to try such an offence.

Certain judges further held that, by the principles of international law, the power of a nation over the sea within three miles of its own coasts is only for certain limited purposes, and Parliament could not, consistently with these purposes, apply criminal law within these limits.

Conviction quashed.

[By the Territorial Waters Jurisdiction Act, 1878, the Queen's Bench has been given jurisdiction, for certain purposes, over acts done within one marine league of the land.]

A GENERAL WARRANT TO ARREST A PERSON UNNAMED IS ILLEGAL

LXX. *Leach* v. *Money*

1763 **19 St. Tr. 1001**

This was an action for trespass against three King's messengers for breaking and entering the plaintiff's house, and falsely imprisoning him without any lawful or probable cause.

The jury found a verdict for the plaintiff, with £400 damages.

The defendants brought a Writ of Error, which alleged that Lord Halifax, as Secretary of State, issued a warrant under his hand and seal to the defendants ordering them

> "To make diligent search for the authors, printers, and publishers of a seditious libel entitled 'The North Briton No. 45, April 23rd, 1763,' and them or any of them having found, to apprehend and seize, together with their papers, and to bring in safe custody before Lord Halifax and to be examined and further dealt with according to law."

The defendants claimed that the alleged trespass and false imprisonment had been committed in the execution of this warrant, they had acted in obedience to it, and if they had erred in the execution of it, they were not answerable.

The plaintiff in reply alleged that the warrant was itself illegal as being against the authors, printers, and publishers of the paper generally, and without naming or describing them.

Lord Mansfield, C.J., said :

> "With regard to the validity of the warrant, upon the single objection of the uncertainty of the person being

neither named nor described—the common law, in many cases, gives authority to arrest without warrant; more especially, when taken in the very act; and there are many cases where particular Acts of Parliament have given authority to apprehend under general warrants, as in the case of writs, to take up loose, idle, and disorderly people. But here, it is not contended, that the common law gives to the officer authority to apprehend; nor that there is any Act of Parliament which warrants this case. Therefore it must stand upon principles of common law.

"It is not fit that the receiving or judging of the information should be left to the discretion of the officer. The magistrate ought to judge, and should give certain directions to the officer. . . .

"All authorities hold such an uncertain warrant void. It is said that the usage has been so; and that many such warrants have been issued, since the Revolution, down to this time. A usage to grow into law ought to be a general usage, *communiter usitata et approbata*."

The opinion of the Court was that the warrant was illegal and bad. Though the case was decided on other grounds, the illegality of general warrants has never been questioned since this decision.

A GENERAL WARRANT TO SEIZE THE PAPERS OF A PERSON UNNAMED IS ILLEGAL

LXXI. *Wilkes* v. *Wood*

1763 **19 St. Tr. 1153**

This was an action of trespass for entering the plaintiff's house, breaking his locks and seizing his papers.

Lord Halifax, a Secretary of State, had issued a warrant to search for and seize the papers of the author of *The North Briton*. The defendant Wood,

in execution of the warrant, had committed the alleged trespass. Wilkes claimed damages. For the defence it was argued that Wood had acted under a legal warrant and was justified.

Pratt, C.J., summing up held that the warrant was illegal, and unless the jury were of opinion that Wood had taken no part in the trespass, they must find a verdict for the plaintiff. He observed:

> "The defendants claim a right, under precedents, to force persons' houses, break open escritoires, seize their papers, etc., upon a general warrant, where no inventory is made of the things thus taken away, and where no offenders' names are specified in the warrant, and therefore a discretionary power is given to messengers to search wherever their suspicion may chance to fall. If such a power is truly vested in a Secretary of State, and he can delegate this power, it certainly may affect the person and property of every man in this kingdom, and is totally subversive of the liberty of the subject."

The jury found a verdict for the plaintiff with £1000 damages.

A WARRANT TO SEIZE THE UNSPECIFIED PAPERS OF A NAMED PERSON IS ILLEGAL

LXXII. *Entick* v. *Carrington*

1763 **19 St. Tr. 1030**

This was an action of trespass against the defendant and three other messengers for breaking and entering the plaintiff's house, and seizing, and carrying away his papers.

The defendants pleaded that they had acted in pursuance of a warrant issued by Lord Halifax, a

Secretary of State. This warrant ordered them to make strict and diligent search for John Entick, the author of a seditious libel. Having found him, they were to seize him and bring him, together with his books and papers, in safe custody before Lord Halifax to be examined and dealt with according to law.

The plaintiff denied that this warrant was legal, or that it justified the defendants in their trespass.

Lord Camden, C.J., in the course of his judgment said :

> " The defendants are under a necessity to maintain the legality of the warrant under which they have acted, and to show that the Secretary of State had a jurisdiction to seize the defendant's papers. If he had no such jurisdiction the law is clear, that the officers are as much responsible for the trespass as their superior. If this point is determined in favour of the jurisdiction, the secret cabinets and bureaus of every subject in this kingdom will be thrown open to the search and inspection of a messenger whenever the Secretary of State shall think fit to charge, or even suspect a person to be the author, printer, or publisher of a seditious libel.
>
> " And with respect to the argument of State necessity, or a distinction which has been arrived at between State officers and others, the common law does not understand that kind of reasoning, nor do our books take notice of any such distinctions."

Held : That the warrant to seize and carry away the papers of the author of a seditious libel is illegal.

Judgment for the plaintiff.

THE IMMUNITY OF FOREIGN SOVEREIGNS FROM THE JURISDICTION

LXXIII. *The Parlement Belge*

1880 **5 P.D. 197**

This was an appeal on behalf of the Crown from a decision of Sir R. J. Phillimore.

In this case proceedings *in rem*, on behalf of the owners of the ship the *Daring*, were instituted in the Admiralty Division against the *Parlement Belge*, to recover redress in respect of a collision. A writ was served in the usual manner on the *Parlement Belge*, but no appearance was entered ; and the Attorney-General, in answer to a motion that a warrant should be issued for the arrest of the *Parlement Belge*, filed an information asserting that the Court had no jurisdiction to entertain the suit. The protest was overruled and a warrant of arrest issued. The Attorney-General appealed.

The *Parlement Belge* was a mail packet running between Ostend and Dover. She was the property of the King of the Belgians, and in his possession and control, and was officered by officers of the Royal Belgian Navy. Besides carrying letters, she also carried merchandise and passengers for hire. The questions before the Court were whether, firstly, the Court had jurisdiction to seize the Belgian vessel in a suit *in rem* ; and secondly, whether any exemption from the jurisdiction of the Court, which the vessel otherwise might have had, was lost by reason of her trading in the carriage of goods and passengers.

The Attorney-General argued that all moveable property, the public property of a sovereign and nation, is exempt from adverse interference by any Court of Judicature on the ground that neither the sovereign of Great Britain, nor any friendly sovereign can be personally impleaded in any Court in this country.

HELD: That, as a consequence of the absolute independence of every sovereign authority, and of the international comity which induces every sovereign State to respect the independence and dignity of every other sovereign State, each and every one declines to exercise, by means of its Courts, any of its territorial jurisdiction over the person of any sovereign or ambassador of any other State, or over the public property of any State which is destined for public use, or over the property of any ambassador; though, such sovereign, ambassador, or property be within its territory, and, therefore, but for the common agreement, subject to its jurisdiction.

The ship in question having been declared by the usual means to be in the possession of the King of the Belgians as sovereign, and to be a public vessel of the State, no Court could inquire by contentious testimony whether the declaration was or was not correct. For the sovereign to submit to such an inquiry before the Court would be to submit to its jurisdiction. The property cannot be denied to be public property, and the fact that the ship was being used subordinately and partially for trading purposes did not take away the general immunity.

Appeal allowed.

MARTIAL LAW

LXXIV. *Tilonko* v. *The Attorney-General of the Colony of Natal*

1907 **[1907] A.C. 93**

This was a petition for special leave to appeal from a judgment and sentence of a military court sitting in Natal. The petitioner was indicted before a court-martial, claiming to sit under a declaration of martial law, for the crimes of sedition and public violence. He submitted that he was not guilty ; and that at the time of his trial the civil courts, before whom he had a right to be tried, had in no way been interrupted in their functions and were then sitting. The military tribunal was therefore without jurisdiction and illegal. A Natal Act of Parliament, 1906, was subsequently passed which purported to approve all sentences passed by any court-martial.

HELD : That there is no analogy between the proceedings of a military court, sitting under what is called the Mutiny Act, and proceedings which are not constituted according to any system of law at all. What is called " martial law " is no law at all. The notion that " martial law " exists by reason of its proclamation is an entire delusion. The right to administer force against force in actual war does not depend upon proclamation at all. It depends upon the question whether there is war or not. If there is war, there is the right to repel force by force ; but it is found convenient and decorous, from time to time, to authorise what are called " Courts " to administer punishments, and to restrain by acts of

repression the violence that is committed in time of war. But to attempt to make these proceedings of so-called " courts-martial " administering summary justice under the supervision of a military commander, analogous to the regular proceedings of Courts of Justice is quite illusory. Such acts of justice are justified by necessity, by the fact of actual war. The question whether war exists or not may be a question of doubt, but no such question arises here. The Indemnity Act of 1906 specifically lays down that no appeal shall lie from these Courts, and consequently no question of appeal could be entertained.

Petition dismissed.

LXXV. *D. F. Marais* v. *The General Officer Commanding the Lines of Communication and the Attorney-General of the Colony.*

Ex Parte D. F. Marais

1902 **[1902] A.C. 109**

This was a petition to the Judicial Committee of the Privy Council for leave to appeal from an Order of the Supreme Court of the Cape of Good Hope.

The petitioner was arrested in August, 1901, without warrant, by order of the military authorities, deported from his native town, and detained in custody. On September 6th he petitioned the Supreme Court in Cape Town to release him, on the ground that his arrest and imprisonment were in violation of the fundamental liberties of the subject. It appeared from the affidavit of the gaoler, where the petitioner was detained, that he was imprisoned by

order of the military authorities for contravening martial law regulations. The Court held that it could not exercise jurisdiction over the petitioner so long as martial law lasted. It was from this decision that the petitioner desired leave to appeal.

The appeal was based on the ground that the district where the arrest was made was undisturbed, and that the civil courts were still exercising uninterrupted jurisdiction. It was alleged that the Crown had no right to resort to such an extremity as the proclamation of martial law except in cases of necessity, and, if a civil court was open, the Crown had no power to try an offender by a military one.

HELD: that where actual war is raging acts done by the military authorities are not justiceable by the ordinary tribunals, and war in this case was actually raging. Doubtless cases of difficulty arise where the fact of a state of rebellion or insurrection is not clearly established.

It may often be a question whether a mere riot or disturbance, neither so serious nor so extensive as really to amount to a war at all, has not been treated with an excessive severity, and whether the intervention of the military force was necessary; but once let the fact of actual war be established, and there is a universal consensus of opinion that the civil courts have no jurisdiction to call in question the propriety of the action of military authorities.

The framers of the Petition of Right knew well what they meant when they made a condition of peace the ground of the illegality of unconstitutional procedure.

Leave to appeal refused.

THE IMMUNITY OF WITNESSES, COUNSEL, JURY, AND JUDGE

LXXVI. *The King* v. *Skinner*

1772 **Lofft 55**

This was a motion to quash an indictment against the defendant, one of His Majesty's Officers of the Peace, for scandalous words spoken by him, in which he said to the grand jury : " You have not done your duty ; you have disobeyed my commands ; you are a seditious, scandalous, corrupt and perjured jury."

Lord Mansfield, C.J., held :

> " Neither party, witness, counsel, jury, or judge can be put to answer, civilly or criminally, for words spoken in office. The words complained of are extremely improper. But to go on an indictment would be subversive of all ideas of a constitution."

The indictment quashed.

THE IMMUNITY OF THE JUDGES

LXXVII. *Hamond* v. *Howell*

1678 **2 Mod. 218**

The plaintiff in this action sought to recover damages against the Mayor of London, the Recorder, and the whole Court at the Old Bailey, for false imprisonment.

The plaintiff was a member of a jury before whom some Quakers were indicted for riot. The jury gave their verdict against the direction of the Court and acquitted the prisoners. The defendant, who tried the action, fined the jury and committed them to prison for non-payment. They were afterwards

discharged upon a writ of *habeas corpus*. The plaintiff then brought this action for wrongful imprisonment.

HELD : " That the bringing of this action was a greater offence than the fining of the plaintiff and committing him for non-payment. The Court acted erroneously in thinking that it was a misdemeanour in the jury to acquit the prisoners, but this was an error in their judgment for which no action will lie. If a judge doth anything unjustly or corruptly, complaint may be made to the King, in whose name judgments are given, and the judges are by him delegated to do justice ; but if there be error in their judgments as here it is void. But no action will lie against a judge for what he doth judicially though erroneously."

LXXVIII. *Kemp* v. *Neville*

1861 **10 C.B., N.S. 523**

The defendant was Vice-Chancellor of the University of Cambridge, and as such invested with certain judicial powers by a Royal Charter of Queen Elizabeth. The plaintiff was brought before him, and he in his capacity as judge caused her to be imprisoned. The plaintiff brought an action for damages for the imprisonment. The jury found that the defendant had not made due inquiry before sentencing her, and that the sentence was undeserved. Upon this finding a verdict was entered for the plaintiff.

The defendant moved to show cause why the verdict should not be entered for him on the above finding.

HELD : that a judicial officer is not liable to be sued for an adjudication according to the best of his

judgment upon a matter within his jurisdiction : and a matter of fact so adjudicated by him cannot be put in issue in an action against him.

The verdict for the plaintiff was set aside and a verdict entered for the defendant.

LXXIX. *Scott* v. *Stansfield*

1868 **L.R. 3 Exch. 220**

This was an action for damages for slander against the defendant, a county court judge, for words alleged to have been spoken falsely and maliciously of the plaintiff.

HELD : That no action is maintainable against the judge of a county court, which is a court of record, for words spoken by him in his judicial character and in the exercise of his functions as judge, even where they are alleged to have been spoken maliciously, and without probable cause, and to be irrelevant to the matter before him.

> " The general proposition is clearly established that no action will lie against a judge for acts done or words spoken in his judicial capacity in a court of justice. This doctrine has been applied not only to the superior courts, but to the court of a coroner and to a court-martial, which is not a court of record. It is essential in all courts that the judges who are appointed to administer the law should be permitted to administer it under the protection of the law independently and freely, without favour and without fear. This provision of the law is not for the protection or benefit of a malicious or corrupt judge, but for the benefit of the public, whose interest it is that the judges should be at liberty to exercise their functions with independence and without fear of consequences."

Judgment for the defendant.

THE IMMUNITY OF JURYMEN

LXXX. *Floyd* v. *Barker*

1607 **12 Rep. 223**

One William Price had been indicted by a grand jury for murder, and was subsequently tried, found guilty, and hanged.

The plaintiff Floyd then brought the grand jury before the Star Chamber on a charge of conspiracy, together with the defendant, the judge who presided at the trial.

HELD : Where a grand jury indicts one of murder or felony and the party is afterwards acquitted, no writ of conspiracy lies against the indictors ; *a multo fortiori* when the party is lawfully convicted, he shall not charge neither the grand jury by whom he was indicted, nor the jury who found him guilty : for the law in such case doth not give any attaint.

Further, it was resolved that the defendant Barker, being a judge by commission and of record, and sworn to do justice, cannot be charged for conspiracy for that which he did openly in Court as Judge or Justice of the Peace. And the law will not admit any evidence against this vehement and violent presumption of law.

LXXXI. *Bushell's Case*

1670 **6 St. Tr. 999**

When the Conventicle Acts were in force, William Penn and William Mead addressed a large assembly of people in Gracechurch Street. They were tried for this offence, and the jury, of whom Bushell was

one, in spite of threats and browbeating by the Court, returned a verdict of not guilty. Whereupon the judge fined each member of the jury 40 marks and committed them to prison in default of payment.

The jury refused to pay and were all imprisoned. Bushell was brought before the Court of Common Pleas upon a writ of *habeas corpus*. The return to the writ stated that he, and the other eleven jurors, having been sworn to try the issues between the King and William Penn, had returned a verdict of not guilty *contra plenam et manifestam evidentiam, et contra directionem curiae* in contempt of the King. For this the Court had committed them to prison.

HELD by all the judges: that finding against the evidence, or direction of the Court, is no sufficient cause to fine a jury.

The prisoners were discharged.

PART III

THE SUBJECT

VIII

THE RIGHTS AND DUTIES OF THE SUBJECT

Owing to the fact that this country has no written constitution, what might be called the constitutional rights and duties of the citizen, which are in many countries embodied in writing, are here derived from the ordinary law of the land. Most of these rights cannot be found in any statutory form and are only laid down in judicial decisions.

The principal rights of the subject are the right to personal freedom, to freedom of discussion, and to freedom of public meeting. The first only of these rights is recognised by statute.

The right of the subject to personal liberty means that all imprisonment and physical coercion of the person is *prima facie* illegal, and can only be justified if there is some reason for it established by law. This right is directly recognised in *Magna Carta* and the Bill of Rights. It is ensured by two means. Firstly, any person who is imprisoned, or any friend on his behalf, can apply for a writ of *habeas corpus*. The writ is issued as a matter of right whenever it is shown that there is some reason to suppose that a person is unlawfully deprived of his liberty. The writ orders the person who detains the prisoner to

take him before the Court and explain the ground of the detention; and if there is any flaw in the cause of imprisonment, the prisoner is entitled to be set at liberty immediately, even though the substantial justice of the imprisonment cannot be disputed.[1] The writ of *habeas corpus* is a common law writ, but it is now regulated by the *Habeas Corpus* Acts (31 Car. II., c. 2 and 56 Geo. III., c. 100). These Acts were passed with a view to ensuring the more efficient working of the writ.

The second means of securing the right of personal freedom is that a person thus wronged can obtain redress, either by taking criminal proceedings against all persons who have shared in imprisoning him, and getting the wrong-doers punished, or by bringing an action for damages.

This right of personal freedom extends to foreigners as well as subjects. It follows that slaves brought to this country are on their arrival free, as their masters have no right to impose any further restraint on them.[2]

There is no constitutional law in this country recognising a right to freedom of discussion and liberty of thought. A man may write and say what he pleases subject to the risk of punishment if it be seditious, blasphemous, or libellous. The decision as to what comes under these heads lies in the hands of a jury. A man can in fact say anything which twelve of his fellow-countrymen think is not blamable, but he is liable to punishment if he publishes what they think is blamable.[3]

[1] Wolfe Tone's Case, LXXXII. [2] Sommersett's Case, LXXXIII.
[3] Rex *v.* Cuthell, LXXXV.

Nor does the law recognise any right of public meeting. A is at liberty to speak to B and C and D individually or collectively; it is this which gives A a right to address a public meeting, so long as neither he nor the meeting breaks the law. The law does not give any right to hold meetings, nor does it recognise any public place in which they can be held.[1] Its attitude is to leave all such meetings alone, unless the object or the manner in which they are held cause them to be illegal.

If a public meeting is so conducted that it is lawful and peaceable, the fact that it may cause others to commit a breach of the peace does not entitle the local authorities to forbid the meetings, or to break them up[2]; but if there is anything unlawful in the conduct of the persons addressing the meeting which is liable to cause a breach of the peace,[3] or the only means of preserving the peace is by dispersing the meeting, then the magistrates can take measures to prevent or break up the meeting. The rights of the individual must give way to the absolute necessity of preserving the peace.

A public meeting is an unlawful assembly when the object for which it is assembled is to commit some act, either of violence or which is likely to cause a reasonable apprehension of violence; or when it is assembled under circumstances which, in the opinion of rational and firm minded men, are likely to result in danger to the tranquillity and peace of the neighbourhood.[4]

If an assembly is unlawful it is the duty of the

[1] *Ex parte* Lewis, LXXXVI. [2] Beatty *v.* Gillbanks, LXXXVII.
[3] Wise *v.* Dunning, LXXXVIII. [4] Regina *v.* Vincent, LXXXIX.

magistrates to disperse it, and they are guilty of criminal negligence if they fail to do so.[1]

In case of riot and breach of the peace it is the duty of all citizens including soldiers,[2] as well as magistrates,[3] to do all that is in their power to restore order and to re-establish the King's peace, and this whether the proclamation set out in the Riot Act has been read or not.[4]

THE RIGHT TO A WRIT OF HABEAS CORPUS

LXXXII. *Wolfe Tone's Case*

1798 **27 St. Tr. 614**

Wolfe Tone was an Irishman. In 1796 he went to France, accepted a commission in the French army, and joined the forces which were designed to invade Ireland. While at sea he was captured and brought for trial to Dublin. There he was tried by court-martial and condemned to death.

Just before the execution application was made to the Irish King's Bench for a writ of *habeas corpus*. The ground of the application was that Wolfe Tone was not a member of His Majesty's army, but had only a commission in the French army. Consequently, no court-martial could take any cognizance of any crime imputed to him while the Court of King's Bench sat in the capacity of the great criminal Court of the land. Mr. Curran, Tone's counsel, admitted that the charges of treason were true, but took his stand upon the fact that in times when war

[1] Regina *v.* Neale, XC.

[2] The Report on the Disturbances at Featherstone, XCIII.

[3] Rex *v.* Pinney, XCI.

[4] Rex *v.* Fursey, XCIV.

is raging, when man is opposed to man in the field, courts-martial may be endured, but that it is a principle of the constitution that martial law and civil law are incompatible, and that the former must cease with the existence of the latter.

The Court of King's Bench granted the writ.

SLAVERY

LXXXIII. *Sommersett's Case*

1771 **20 St. Tr. 1**

Sommersett was a negro slave from Virginia. His master, Mr. Stewart, had purchased him there and brought him to England. While in England with his master Sommersett had run away, but had been recaptured by Mr. Stewart's servants and forcibly carried on board a ship bound for Jamaica. Knowles, the master of the ship, kept Sommersett confined in irons. The negro's friends applied for a writ of *habeas corpus*, which was granted, and Knowles was required to return the body of Sommersett before the Court of King's Bench with the cause of detainer.

The judgment of the Court was delivered by Lord Mansfield, C.J.,

> " The only question before us is whether the cause of the return is sufficient ? If it is the negro must be remanded, if it is not he must be discharged. Accordingly the return states that the slave departed and refused to serve, whereupon he was kept to be sold abroad. So high an act of dominion must be recognised by the law of the country where it is used. The state of slavery is of such a nature that it is incapable of being introduced on any reasons, moral or political, but only by positive law, which

preserves its force long after the reasons, occasion, and time itself from whence it was created, are severed from memory. It is so odious that nothing can be suffered to support it, but positive law. Whatever inconveniences therefore may follow the decision, I cannot say this case is allowed or approved by the law of England, and therefore the black must be discharged."

FREEDOM OF DISCUSSION

LXXXIV. *Rex* v. *William Cobbett*

1804 **29 St. Tr. 1**

William Cobbett was charged with printing a paper libelling Lord Hardwicke, the Lord-Lieutenant of Ireland, and various ministers of the King in Ireland.

Lord Ellenborough in summing up said :

" Upon the subject of libel it may be well for me to observe, before I enter upon the question, that, by the law of England, there is no impunity to any person publishing anything that is injurious to the feelings and happiness of an individual, or prejudicial to the general interests of the State. Gentlemen, the law of England is a law of liberty, and consistently with this liberty we have not what is called an *imprimatur* ; there is no such preliminary licence necessary. But, if a man publish a paper, he is exposed to the penal consequences, as he is in every other act, if it be illegal ; and it is illegal, if it tends to the prejudice of any individual."

Verdict of guilty.

LXXXV. *Rex* v. *Cuthell*

1799 **27 St. Tr. 642**

John Cuthell was charged with publishing a seditious libel, in which he urged the King's subjects not to resist an enemy invading the kingdom.

Lord Kenyon in summing up said :

" As to the general right to the liberty of the press. After all the truth of the matter is very simple when stripped of all the ornaments of speech, and a man of plain common sense may easily understand it ; it is neither more nor less than this, that a man may publish anything which twelve of his countrymen think is not blamable, but that he ought to be punished if he publishes that which is blamable. This, in plain common sense, is the substance of all that has been said upon the subject."

The jury found the defendant guilty.

THE RIGHT OF PUBLIC MEETING

LXXXVI. *Ex Parte Lewis*

1888 **21 Q.B.D. 191**

This was an application in the Queen's Bench calling on the magistrate at Bow Street to show cause why he should not hear and determine an application for summonses against the Secretary of State for the Home Department and the Chief Commissioners of the Metropolitan Police, for indictable offences which it was alleged they had committed.

The offences consisted of forbidding and preventing the holding of a public meeting in Trafalgar Square. The magistrate had refused to issue the summonses on the ground that they disclosed no legal offence.

HELD : That the Court had no jurisdiction to direct the magistrate to alter his decision. In the course of the judgment it was said :

" A great deal has been said about the right of public meeting unnecessarily, as it is a right which has long

passed out of the region of discussion or doubt. As to the suggested right of holding public meetings in Trafalgar Square, which is, in other words, a suggestion of a right on the part of as many of Her Majesty's subjects as may be disposed to occupy Trafalgar Square, whenever and so often as they may wish, for a public meeting, to be held by persons of conflicting views and sympathies (for the right if it exist, must be common to every member of the public) all we wish to say is, if the right is to be made out it must be established by materials and considerations very different from any that were laid before us.

"A claim on the part of persons so minded to assemble in any numbers, and for so long a time as they please to remain assembled, upon a highway, to the detriment of others having equal rights, is in its nature irreconcilable with the right of free passage, and there is so far as we have been able to ascertain no authority whatever in favour of it. It was urged that the right of public meeting, and the right of occupying any unoccupied land or highway that might seem appropriate to those of Her Majesty's subjects who wish to meet there, were, if not synonymous, at least correlative. We fail to appreciate the argument."

Rule refused.

LXXXVII. *Beatty and Others* v. *Gillbanks*

1882 **9 Q.B.D. 308**

The appellants, at a Petty Sessions at Weston-super-Mare, were charged with tumultuously assembling with divers other persons to the disturbance of the public peace. Upon the hearing of the complaint, the justices found the allegations proved, and ordered the appellants to be bound over to keep the peace for twelve months. It was from this order that the appellants appealed.

The appellants were leaders of the Salvation Army. This body was accustomed to form a procession and march through the streets of Weston-super-Mare. The association had no unlawful object, but it was unpopular among certain elements of the population in the town, and a rival body was formed called the Skeleton Army. This body used to parade the streets at the same time as the Salvation Army, and oppose the latter's progress, which resulted in considerable disturbance and stone throwing in the streets. The Justices of the Peace of the district, to prevent a repetition of these scenes, served a notice on the appellants requiring them to abstain from assembling in the streets to the disturbance of the public peace. In spite of this notice the appellants again led a procession through the streets and were arrested. It was clear that the Salvation Army had no wish to enforce their opinions with violence, and the appellants made no opposition to the authorities.

HELD: That since everyone must be taken to intend the natural consequences of their acts, if the natural consequences of the acts of the appellants was the disturbance of the peace, the justices would have been right in binding them over. But as the evidence showed that the disturbances were, on the contrary, caused by other people antagonistic to the appellants, who had committed no acts of violence, they were guilty of no offence.

There is no authority for the proposition that a man may be convicted for doing a lawful act if he knows that his doing it may cause another to do an unlawful act. In this case what had happened was

that an unlawful organisation had assumed to itself the right to prevent the appellants and others from lawfully assembling together.

Judgment for the appellants.

THE EFFECT OF THE UNLAWFUL CONDUCT OF PERSONS ADDRESSING A MEETING

LXXXVIII. *Wise* v. *Dunning*

1902 **[1902] 1 K.B. 167**

This was an appeal from an order of the Liverpool stipendiary magistrate binding over the appellant in recognisances to be of good behaviour.

The appellant was a Protestant lecturer, and he had held meetings in the streets and public places of Liverpool. The object of the meetings was to attack the Roman Catholic religion, and in doing this much defamatory and abusive language was used. The meetings, which were largely attended by both Protestants and Roman Catholics, had resulted not only in the obstruction of the streets, but also in various breaches of the peace and riots. The appellant threatened to hold similar meetings in the future, but he did not himself at any time commit any breach of the peace, or threaten, or invite any other person to do so. A local Act provided that any person using threatening, abusive, or insulting words in the streets, whereby a breach of the peace might be occasioned, might be fined by the magistrates. The appellant was bound over to keep the peace and be of good behaviour.

The appellant appealed on the ground that he had committed no unlawful act by holding meetings in

the public streets. The holding of a meeting in the public street was not unlawful unless it was proved that a danger or obstruction had taken place, and there was no evidence that any danger or obstruction had taken place.

HELD : that on the facts, and bearing in mind the local Act, no one could reasonably doubt that the magistrate and police were right in thinking that the plaintiff's language and conduct went very far indeed towards inviting people to commit, or was, at any rate, language and behaviour likely to occasion, a breach of the peace ; and that the magistrates were only doing their duty when they had regard to, and made themselves acquainted with, the character of the population amongst whom they had to administer justice ; and in considering the natural consequences of a man's acts, who has used insulting language in the streets towards persons of a particular religion, the magistrates are bound to take into consideration the fact that there is a large body of these persons in the town.

The law does regard the infirmity of human temper to the extent of considering that a breach of the peace, although an illegal act, may be the natural consequence of insulting or abusive language or conduct.

Judgment for the respondent.

UNLAWFUL ASSEMBLIES

LXXXIX. *Regina* v. *Vincent and Others*

1839 **9 C. & P. 91**

The defendants were charged with attending unlawful assemblies.

It was proved that there had been various large meetings in Newport. At these meetings certain speeches were made by the defendants which greatly excited the mob ; but there was no violence, though many of those present were armed with sticks. The defendants indeed expressly asked that there should be no breach of the peace. But from the conduct of the meetings there was a considerable amount of noise.

The defendants contended that the meetings were not unlawful assemblies.

Alderson, B., in summing up directed the jury as follows :

> " I take it to be the law of the land that any meeting assembled under such circumstances as, according to the opinion of rational and firm minded men, is likely to produce danger to the tranquillity and peace of the neighbourhood, is an unlawful assembly. You will have to say whether, looking at all the circumstances, these defendants attended an unlawful assembly, and for this purpose you will take into your consideration the way in which the meetings were held, the hour of the day at which the parties met, the language used by the persons assembled, and by those who delivered them. Everyone has a right to act in such cases as he may judge right, provided it be not injurious to another, but no man or number of men has a right to cause alarm to the body of persons called the public. You will consider how far these meetings partook of that character, and whether firm and rational men having families and property there would have reasonable ground to fear a breach of the peace ; the alarm must not be merely such as would frighten any foolish or timid person, but must be such as would alarm persons of reasonable firmness and courage."

Verdict of guilty.

THE DUTY OF MAGISTRATES TO DISPERSE AN UNLAWFUL ASSEMBLY

XC. *Regina* v. *Neale and Others*

1839 **9 C. & P. 431**

The defendants were indicted for a riot at Birmingham on the 4th of July, 1839.

There had been a number of tumultuous public meetings in Birmingham with which the local police had been powerless to cope. On the 4th of July a tumultuous meeting assembled and one of the magistrates, together with a number of special constables, went to the meeting and asked the mob to disperse. This the mob refused to do, and overpowered the police. The Riot Act was then read and the military sent for, who cleared the meeting. The defendants, persons who had taken an active part in the riot, alleged that the magistrate and police had no authority to assail the people, and that the people were justified in repelling the assault and were not guilty of any offence.

Littledale, J., in summing up said :

> " Up to the time that the magistrate went among the people no riot had taken place on that day ; it is, however, another question whether there had been an unlawful assembly ; because if there was a meeting attended with circumstances calculated to excite alarm, that is an unlawful assembly. It is not only lawful for magistrates to disperse any such meeting, but if they do not, and are guilty of criminal negligence in not putting down any unlawful assembly, they are liable to be prosecuted for a breach of their duty. The first question is whether this meeting, constituted as it was before the magistrate and

the police made their appearance, was an unlawful assembly; if it was, then the magistrate had a right to disperse it."

The jury found the defendants guilty.

THE DUTY OF MAGISTRATES IN TIME OF RIOT

XCI. *Rex* v. *Pinney*

1832 **5 C. & P. 254**

This was an information filed by the Attorney-General charging the defendant, the Mayor of Bristol, with a neglect of duty. From Saturday, 29th, to Monday, the 31st of October, there were riots in Bristol, and various public and private buildings were burnt down, several persons were killed, and many injured. The information charged the defendant as mayor with not regarding his duties but neglecting them. It was alleged that he did not use due means to put down the riot; and that he did not organise a sufficient force, nor give such orders and directions as he ought; and that he absented and concealed himself, and permitted the rioters to continue assembled for a long time.

Littledale, J., in summing up said:

"There can be no doubt that if a public officer be neglectful of his duty, he is liable to be prosecuted by information or indictment. Now a person, whether a magistrate or a peace officer, who has the duty of suppressing a riot, is placed in a difficult situation, for if, by his acts, he causes death, he is liable to be indicted for murder or manslaughter, and if he does not act he is liable to an indictment on an information for neglect; he is therefore bound to hit the precise line of his duty. How difficult

it is to hit that precise line will be matter for your consideration, but that, difficult as it may be, he is bound to do. Whether a man has sought a public situation, as is often the case of mayors or magistrates, or whether, as a peace officer, he has been compelled to take the office that he holds, the same rule applies. . . . Still, you ought to be satisfied that the defendant has been clearly guilty of neglect before you return a verdict against him ; and here, I ought to remark, that mere good feeling or upright intentions are not sufficient to discharge a man, if he has not done his duty. The question here is, whether the defendant did all that he knew was in his power, and which could be expected from a man of ordinary prudence, firmness, and activity, to suppress these riots. Did he make all the use of those means which an honest man ought to do by his own personal exertions ? "

The jury returned a verdict of not guilty.

THE RIGHT OF ALL PERSONS TO RESTORE THE PEACE BY FORCE

XCII. *The Case of Armes*

1597 **Popham 121**

Upon an assembly of all the Justices and Barons at Serjeant's Inn, upon this question moved by Anderson, Chief Justice of the Common Bench,

" whether men may arm themselves to suppress riots, rebellions, or to resist enemies, and to endeavour themselves to suppress or resist such disturbers of the peace or quiet of the realm ; upon good deliberation, it was resolved by them all, that every justice of peace, sheriff and other minister, or other subject of the King, where such accident happens, may do it.

" But they take it to be the more discreet way for every one in such case to attend and be assistant to the justices, sheriffs or other ministers of the King on the doing of it."

THE DUTY OF SOLDIERS IN TIMES OF CIVIL DISTURBANCE

XCIII. *The Report of the Committee Appointed to Inquire into the Circumstances Connected with the Disturbances at Featherstone on the 7th of September*, 1893.

1893 **C.—7234**

On the 7th September, 1893, riots broke out at the Ackton Colliery. The local police were insufficient in numbers to cope with the disturbance, and a small number of soldiers, in charge of one officer, were sent for and took possession of the colliery. The mob surrounding the colliery gradually increased to some two thousand, and the outbuildings of the colliery were set on fire. The Riot Act was read without effect, and before one hour had elapsed, as the mob refused to disperse, the officer gave the order to fire. As a result two bystanders, who were not taking any active part in the riot, were killed.

Commissioners were appointed to report on the conduct of the troops, and the law as to the duty of soldiers when called on to disperse a mob.

The following is a passage from the report :

" By the law of this country everyone is bound to aid in the suppression of riotous assemblages. The degree of force, however, which may lawfully be used in their suppression depends on the nature of each riot, for the force must always be moderated and proportioned to the circumstances of the case, and to the end to be attained.

" The taking of life can only be justified by the necessity for protecting persons or property against various forms

of violent crimes, or by the necessity of dispersing a riotous crowd which is dangerous unless dispersed, or in the case of persons whose conduct has become felonious through disobedience to the provisions of the Riot Act, and who resist the attempt to disperse or apprehend them. . . .

" Officers and soldiers are under no special privileges and subject to no special responsibilities as regards this principle of law. A soldier for the purpose of establishing civil order is only a citizen armed in a particular manner. He cannot, because he is a soldier, excuse himself if without necessity he takes human life. The duty of magistrates and peace officers to summon, or to abstain from summoning, the assistance of the military, depends in like manner on the necessities of the case. A soldier can only act by using his arms. The weapons he carries are deadly. To call for assistance against rioters from those who can only interpose under such grave conditions ought, of course, to be the last expedient of civil authorities. . . .

" The whole action of the military when once called in ought, from first to last, to be based on the principle of doing, and doing without fear, that which is absolutely necessary to prevent serious crime, and of exercising all care and skill with regard to what is done. . . . When the need is clear, the soldier's duty is to fire with all reasonable caution, so as to produce no further injury than what is absolutely wanted for the purpose of protecting person and property. An order from the magistrate who is present is required by military regulations. But the order of the magistrate has at law no legal effect. Its presence does not justify the firing if the magistrate is wrong. Its absence does not excuse the officer for declining to fire when the necessity exists.

" With the above doctrines of English law the Riot Act does not interfere. The effect is only to make the failure of a crowd to disperse for a whole hour after the procla-

mation has been read a felony. . . . The fact that an hour has not expired since its reading does not incapacitate the troops from acting when outrage has to be prevented. All their common law duty as citizens and soldiers remains in full force. . . . An innocent person killed under such conditions, where no negligence has occurred, dies by an accidental death."

THE EFFECT OF THE READING OF THE RIOT ACT ON AN ILLEGAL ASSEMBLY

XCIV. *Rex* v. *Fursey*

1833 **6 C. & P. 81**

The indictment charged the prisoner with stabbing a special constable who was trying to arrest him. The prisoner, it was alleged, was taking part in a tumultuous meeting, and the special constable, in the exercise of his duty, was endeavouring to restore order. Prior to the meeting a notice had been posted up in the city declaring the meeting to be illegal. The prisoner denied that the meeting was unlawful, and produced evidence to show that he was justified in resisting the constable.

Gaselee, J., in summing up said :

" It appears that the proclamation contained in the Riot Act was not read. Now, a riot is not the less a riot, nor an illegal meeting the less an illegal meeting, because the proclamation of the Riot Act has not been read ; the effect of that proclamation being to make the parties guilty of a capital offence[1] if they do not disperse within an hour ; but, if that proclamation be not read, the common law offence remains, and it is a misdemeanour ; and

[1] The effect of the proclamation to-day is to make the failure of the crowd to disperse within the hour a felony. At the date of this case, such a felony was an offence punishable by death.

all magistrates, constables, and even private individuals are justified in dispersing the offenders ; and if they cannot otherwise succeed in doing so, they may use force.

" Without any proclamation at all, if a meeting is illegal, a party who attends it, knowing it to be so, is guilty of an offence. There may be a difficulty in saying in what way this meeting was illegal, but it was illegal, either as a misdemeanour or as a higher offence, and, whichever it was, it justifies the dispersal of the meeting."

Verdict not guilty.

IX

ALIENS AND NATIONALITY

ALIENS are divided into two types, alien friends and alien enemies. Alien friends have long since been granted the same civil rights as British subjects, and are entitled to the enjoyment of all the personal rights of a citizen. These privileges are not shared by alien enemies, who have no civil rights or privileges, and are incapable of bringing an action in the British Courts, unless they are in this country by the permission of the Crown, when their position approximates to that of alien friends.[1]

Though alien friends have in this country rights which are so closely analogous to those of the citizen, they have no legal right to enter British territory, and to insist on being permitted to enjoy the privileges which it offers.[2] One of the rights possessed by the supreme power in every state is the right to refuse permission for an alien to enter that state, to annex what conditions it chooses to the right of entry, and to expel or deport such alien at pleasure.[3] But this common law right of expulsion

[1] Porter *v.* Freudenberg, XCV.

[2] Musgrove *v.* Chun Teeong Toy, XCVI.

[3] The Attorney-General for the Dominion of Canada *v.* E. E. Cain, XCVII.

has not been exercised since 1575, and now rests on statutory authority. The Extradition Acts have empowered the Crown to make arrangements with foreign states for the mutual extradition of criminals, and various further statutory powers have been conferred on the Home Secretary, enabling him to expel undesirable aliens.

Aliens who are permitted to stay here owe a temporary and local allegiance to the Crown, to the same extent as a British subject, and may be convicted of treason. The duty of such an alien, including an alien enemy, is so to act that the Crown shall not be harmed by reason of its having admitted him as a resident.[1]

In the early days of the common law it was not possible to change nationality; once a subject always a subject, once an alien always an alien, except that special Acts of Parliament were occasionally passed conferring rights of citizenship on individual aliens. Since the Naturalisation Act, 1870, and now under the British Nationality and Status of Aliens Acts, 1914-1922, it is possible for a Secretary of State, at his absolute discretion, to grant a certificate of naturalisation to an alien who fulfils certain statutory requirements, and who takes the oath of allegiance. In this way an alien can become a naturalised citizen of Great Britain, enjoying all the rights and privileges of a natural born subject, only subject to the fact that the certificate is liable, in certain circumstances, to be revoked.

The same Act provides that the natural born subject, who becomes a naturalised subject of a

[1] De Jager *v.* The Attorney-General of Natal, XCVIII.

foreign state, thereby divests himself of British nationality; and in addition the Act empowers the subject, in certain circumstances, to make a declaration of alienage, whereby he loses his nationality.

All natural born subjects of the King enjoy the rights of subjects, whatever dominion they may have been born in, and cannot be treated as aliens in any part of the Empire; their rights, however, may be limited by the local law.[1] Though the allegiance he owes the King is not confined to the part of the Empire in which the liegeman was born, yet if such place of birth, by treaty or for any other reason, ceases to form part of the dominions of the Crown, the duties of allegiance are at an end.[2] The rights are not so extensive in the case of a person who is not a natural born subject. A subject naturalised under the Act of 1870 in the United Kingdom, or under similar Acts in the Dominions, has only the rights of a British subject in the United Kingdom or in the Dominion where he was naturalised. Such naturalisation is of limited operation, so that a naturalised subject of the Commonwealth of Australia may be treated as an alien here.[3]

The Naturalisation Act of 1914 has to a certain extent altered this, by providing a method, which when adopted by the Dominions, will lead to a system of naturalisation, granted either by the authorities of Great Britain or the Dominions, conferring rights of British citizenship co-extensive with the Empire, with the exception that the Act does not

[1] Calvin's Case, XCIX. [2] Isaacson *v.* Durant, C.
[3] Markwald *v.* The Attorney-General, CI.

confer such rights in a Dominion which has not adopted it.

The power conferred on the subject by the Acts of 1870 and 1914 by which he can divest himself of British nationality, and throw off the duties of allegiance, cannot be exercised in time of war, if by so doing the subject acquires enemy nationality, for this is of itself treason.[1] Nor in war can he adopt alien or neutral nationality, if by such means he seeks to evade the duties of citizenship already imposed upon him.[2]

THE RIGHT OF AN ALIEN TO SUE IN THE KING'S COURT

XCV. *Porter* v. *Freudenberg*

1915 **[1915] 1 K.B. 875**

This was an action to recover rent due under a lease. The defendant was an alien enemy living in Berlin. Before the outbreak of war he had been carrying on business in England in the premises the subject of the action. The question raised was whether an alien enemy, who owed a debt to a British subject, could be sued.

Lord Reading, C.J., in delivering the judgment of the Court of Appeal said :

> " The main questions to be considered are, firstly, the capacity of alien enemies to sue in the King's Courts ; secondly, their liability to be sued ; thirdly, their capacity to appeal to the Appellate Courts, and generally their right to appear and be heard in the King's Courts. . . .
>
> " In ascertaining the rights of aliens the first point of consideration is whether they are alien friends or alien

[1] The King *v.* Lynch, CIII. [2] Gschwind *v.* Huntingdon, CIV.

enemies. Alien friends have long since been, and are at the present day, treated in reference to civil rights as if they were British subjects, and are entitled to the enjoyment of all personal rights of a citizen, including the right to sue in the King's Courts. Alien enemies have no civil rights or privileges unless they are here under the protection and by permission of the Crown. . . .

" An alien enemy's right to sue, or proceed either by himself or by any other person on his behalf, in the King's Court, is suspended during the progress of hostilities, and until after peace is declared. The next point to consider is whether he is liable to be sued in the King's Courts during the war. To allow an alien enemy to sue or proceed during war in the civil courts of the King would be to give to the enemy the advantage of enforcing his rights by the assistance of the King with whom he is at war. But to allow the alien enemy to be sued or proceeded against during war is to permit subjects of the King, or alien friends, to enforce their rights with the assistance of the King against the enemy. The rule of law suspending the alien enemy's right of action is based on public policy, but no considerations of public policy are apparent which would justify preventing the enforcement by a British or neutral subject of a right against the enemy. The effect of this would be to convert that which during war is a disability, imposed upon the alien enemy because of his hostile character, into a relief to him during war from the discharge of his liabilities to British subjects. . . .

" Once this conclusion is reached that the alien enemy can be sued, it follows that he can appear and be heard in his defence and may take all such steps as may be necessary for the proper presentment of his defence. To deny him that right would be to deny him justice and would be quite contrary to the basic principles guiding the King's Courts in the administration of justice. Equally it seems to result that, when sued, if judgment proceed against him, the Appellate Courts are as much open to him as to

any other defendant. He is entitled to have his case decided according to law, and if the judge in one of the King's Courts has erroneously adjudicated upon it he is entitled to have recourse to another and an Appellate Court to have the error rectified."

POWER TO EXCLUDE ALIENS

XCVI. *Musgrove* v. *Chun Teeong Toy*

1891 **[1891] A.C. 272**

This was an appeal from the judgment of the Supreme Court of Victoria. The question on appeal was whether the Colonial Government, as representing Her Majesty, had power to prevent the respondent from landing on the shores of the colony.

Certain enactments of the legislature of Victoria laid down that no ship could bring to Victoria more than a certain number of Chinese immigrants, and that before any such immigrant should be permitted to land, the sum of £10 should be paid in respect of each such immigrant. The respondent, when plaintiff in the Court below, admitted that he was an immigrant within the enactments ; but alleged that as he had tendered the sum of £10 to the appellant, who was the officer appointed under the Act to receive such payment, the appellant had no right to refuse to accept the £10, and to refuse to allow the respondent to land. The appellant pleaded justification, as having acted under the orders of a colonial minister, in exercise of the prerogative of the Crown to exclude alien friends. It was held by the Supreme Court of Victoria that this defence was bad.

The Judicial Committee of the Privy Council held : that having in view only the enactments of the

legislature of Victoria, it appeared that no cause of action was disclosed. This was sufficient to determine the appeal against the respondent, but, apart from the statutes, a question of the respondent's right to maintain the action arose. He could only do so if he could establish that an alien had a legal right, enforceable by action, to enter British territory. No authority existed for the proposition that an alien had any such right. Circumstances might occur in which the refusal to permit an alien to land, might be such an interference with international amity as would properly give rise to diplomatic remonstrance from the country of which he was a native. But it was quite another thing to assert that an alien, excluded from any part of Her Majesty's dominions by the executive government there, could maintain an action in a British Court and raise such questions as were argued before their lordships on this appeal. Had the proper officer for giving or refusing access to the country been duly authorised by his own colonial government? Had the colonial government received sufficient delegated authority from the Crown to exercise this authority? Had the Crown the right, without parliamentary authority, to exclude an alien? Their lordships could not assent to the proposition that an alien, refused permission to enter British territory, could, in an action in a British Court, compel the decision of such matters as these, involving delicate and difficult constitutional questions affecting the respective rights of the Crown and Parliament, and the relations of this country to her self-governing colonies. When once it was admitted that there was no absolute and unqualified right of action on

behalf of an alien refused permission to British territory, their lordships were of opinion that it was impossible for the action to be maintained.

Judgment of the Court below reversed.

POWER TO DEPORT AN ALIEN

XCVII. *The Attorney-General for the Dominion of Canada* v. *Everett E. Cain*

1906 **[1906] A.C. 542**

This was an appeal from the High Court of Ontario. On May 23rd, 1905, the appellant issued a warrant under S. 6 of the Dominion Act 60 and 61, Vict. c. 11, as amended by 61 Vict. c. 2 and 1, Edw. 7, c. 13, to take the respondent, then residing in the province of Ontario, and return him to the United States of America.

These Acts provided by S. 6 that:

> " the Attorney-General of Canada, in case he shall be satisfied that an immigrant has been allowed to land in Canada contrary to the prohibition of this Act, may cause such immigrant, within the period of one year after landing or entry, to be taken into custody and returned to the country whence he came."

On being arrested the respondent was discharged on a writ of *habeas corpus*, solely on the ground that the above Acts were *ultra vires* of the Dominion Parliament. The High Court of Ontario held that the Parliament of Canada had no power to pass S. 6 of the Act in question, on the ground that the words " returned to " implied the exercise of constraining force outside the territorial limits of Canada, and that no colonial legislature had power to enact legis-

lation to be actively enforced beyond the boundaries of the colony.

From this order discharging the respondent the Attorney-General for the Dominion of Canada appealed.

Lord Atkinson delivering judgment said :

" In 1763 Canada and all its dependencies was ceded to Great Britain. Upon that event the Crown of England became possessed of all legislative and executive powers within the country, and save so far as it has since parted with these powers by legislation, royal proclamation or voluntary grant, it is still possessed of them. One of the rights possessed by the supreme power in a State is the right to refuse to permit an alien to enter that State, to annex what conditions it pleases to the permission to enter it, and to expel or deport from the State at pleasure even a friendly alien, especially if it considers his presence in the State opposed to its peace, order, or good government, or to its social and material interests. The Imperial Government might delegate these powers to the Government of one of the colonies, either by royal proclamation, which has the force of a statute—*Campbell* v. *Hall* [1]—or by a statute of the Imperial Parliament, or by a statute of a local Parliament to which the Crown has assented. . . .

" The question therefore is whether the Acts in question assented to by the Crown, have clothed the Dominion Government with the power the Crown itself theretofore undoubtedly possessed to expel an alien from the Dominion or to deport him to the country whence he entered the Dominion. . . .

" Their lordships are of opinion that power to expel aliens who have entered Canada against the laws of the Dominion was given by these statutes to the Dominion, and it necessarily follows that the statute has given them power to impose that extra territorial constraint which is

[1] See page 200.

necessary to enable them to expel these aliens, to the same extent as the Imperial Government would itself have imposed the constraint for a similar purpose, had the statute never been passed."

Appeal allowed.

LOCAL ALLEGIANCE OWED BY ALIENS TO THE CROWN

XCVIII. *De Jager* v. *The Attorney-General of Natal*

1907 **[1907] A.C. 326**

This was a petition for special leave to appeal from a judgment of a special court of the colony of Natal whereby, in 1901, the petitioner was adjudged guilty of high treason, and was sentenced to five years' imprisonment and to pay a fine of £5000.

The petitioner was a burgher of the late South African Republic, who for ten years prior to the outbreak of war in 1899 had resided at Waschbank in Natal. The Boer forces occupied Waschbank from October, 1899, to March, 1900. While the Boers were in occupation the petitioner joined their forces as commandant. On the re-establishment of British control he was found guilty of treason. The petitioner appealed on the ground that he only owed a local and temporary allegiance to Her Majesty whilst he was a resident in Natal, and was actually enjoying Her Majesty's protection. When that protection ceased his duty of allegiance ceased, and acts of service to his own Government, which he was compellable to give, were not treasonable.

Held by the Privy Council : that an alien resident within British territory owes allegiance to the Crown,

and may be indicted for high treason though not a subject ; and that there is no ground for the assumption that this liability arises from the fact that while on British territory he receives the King's protection.

The protection of a State does not cease merely because the State's forces, for strategic or other reasons, are temporarily withdrawn, so that the enemy for the time exercises the rights of an army of occupation. The duty of an alien is so to act that the Crown shall not be harmed by reason of its having admitted him as a resident. He is not to take advantage of the hospitality extended to him against the sovereign who extended it. Great numbers of aliens reside in this and other countries, and it is regarded as a great hardship if they are compelled to leave, as they rarely are, even in the event of war between their own sovereign and the country in which they reside. It would be intolerable if, as soon as an enemy made good his military occupation of a particular district, those who till then lived there peacefully, as aliens, could with impunity take up arms for the invaders. There is no authority for such a conclusion.

Petition dismissed.

NATIONALITY

XCIX. *Calvin's Case*

1608 **7 Rep. 1. 2 St. Tr. 559**

After the accession of James I. to the throne, thus uniting the Crowns of England and Scotland, the question arose as to whether the *postnati*, subjects born after the union in Scotland, were to be considered

as aliens or natives in England. To determine this question two suits were brought in the name of Robert Calvin, a *postnatus*, claiming certain freehold land. To this plea the defendant demurred on the ground that Calvin was an alien, and as the law then stood incapable of holding land in England. The case was adjourned into the Exchequer Chamber that the opinion of the judges might be obtained.

HELD : that Robert Calvin was a native and entitled to the land. Whoever is born under one allegiance and owes obedience to the sovereign, is a natural born subject.

C. *In Re The Stepney Election Petition*

Isaacson v. *Durant*

1886 **17 Q.B.D. 54**

The point raised in this case was whether Hanoverians, born before the accession of the Queen (at a time when the Crowns of England and Hanover were held by the same person), resident in this country, not naturalised, but being in all other respects qualified to vote, were entitled to vote at the election for members of Parliament. If Queen Victoria had been Queen of Hanover, they would have been in exactly the same situation as Calvin, and the decision in his case would have given them votes.

HELD : that the Crowns had by accident been united in one person, but when the union of the Crowns came to an end, the union of allegiance ceased too ; and the allegiance which had been due to the King of Hanover, who was also King of the

United Kingdom, was never at any time due to the Queen of the United Kingdom, who could not be by law Queen of Hanover.

THE EFFECT OF NATURALISATION IN A DOMINION

CI. *Markwald* v. *Attorney-General*

1920 **[1920] 1 Ch. 348**

This action was brought by the plaintiff, a German by birth, but naturalised in the Commonwealth of Australia, against the Attorney-General for a declaration

> " that, he was no alien in England but a liege subject of His Majesty the King, and entitled to the protection of His Majesty the King in all parts of his Majesty's Kingdom and Dominions."

The plaintiff was born in Germany in 1859. He left Germany in 1878 and resided in Australia, where, in 1908, he obtained a certificate of naturalisation within the Commonwealth of Australia, and took the oath of allegiance. This naturalisation was granted pursuant to the Commonwealth of Australia Naturalisation Act, 1903. This Act of 1903 enabled the Governor-General to grant a certificate of naturalisation to persons fulfilling certain requirements ; and a person so naturalised was granted, in the Commonwealth, all political rights, powers, and privileges, and made subject to all the obligations of a natural born British subject in the Commonwealth. The plaintiff claimed that by virtue of a certificate of naturalisation under this Act, coupled with the taking of the oath of allegiance, he had ceased to be an alien

in Great Britain. This point had been previously dealt with, as in 1917 the plaintiff was charged and convicted, for that being an alien he had failed to furnish to a registration officer the particulars required by the Aliens Restriction (Consolidation) Order, 1916. The conviction was upheld in the Divisional Court. (*Rex* v. *Francis*. *Ex parte Markwald* (1918) 1 K.B. 617.)

The plaintiff began this action in 1918, and the Judge of first instance dismissed the action on the ground that the matter had been settled by *Rex* v. *Francis*. The plaintiff appealed.

HELD : that up to 1914, the scheme of legislation was that a certificate of naturalisation in Great Britain (the Naturalisation Act, 1870) should give rights within Great Britain and within Great Britain alone ; and that the certificate in a British possession should give rights within the British possession, and within that possession alone. Neither the taking of the oath of allegiance alone, nor the taking of an oath coupled with a grant of a certificate of naturalisation in Australia, made the plaintiff a British subject in the United Kingdom. The plaintiff's allegiance was local, and no authority had been given by the sovereign to anyone to accept a wider allegiance. By virtue of his naturalisation in Australia, and the taking of an oath of allegiance, the plaintiff had become a liege subject of the King in some part of his dominions, yet not in all ; and wherever he was not a subject he was an alien.

The effect of *Calvin*'s *case*[1] is that allegiance in the case of a natural born subject to a Liege Lord, who

[1] See page 182.

is also a Liege Lord of more than one dominion, is not confined to the dominion in which the liegeman was born, but is a personal allegiance to the Liege Lord throughout all his dominions. It also shows that there may be a local allegiance in a person who is not a natural born subject. It therefore does not exclude the possibility of a limited allegiance in the case of a person who is not a natural born subject, and it leaves open the question as to what was the intention of the legislature when Acts of Parliament are in question.

The oath of allegiance depends for its validity upon the Royal request, expressed or implied, and its operation is limited by the terms in which, or to the purpose for which, that request is made. In the present case, upon the true construction of the Commonwealth statute, the oath to consecrate the applicant's naturalisation was as limited in its operation as that naturalisation itself.

Appeal dismissed.

THE POSITION OF A STATELESS PERSON

CII. *Stoeck* v. *The Public Trustee*

1921 **[1921] 2 Ch. 67**

The plaintiff sued the Public Trustee and the Attorney-General for a declaration that he was not on January 10th, 1920 (the date when the treaty of peace with Germany came into force), a German national within the meaning of the Treaty of Peace Order, 1919. The object of the action was to ascertain whether he could deal with certain property in

this country, without incurring the pains and penalties imposed by the Order on any person dealing with property charged by the treaty.

The plaintiff was born in Prussia in 1872. In 1895 he left Prussia, and in 1896 obtained his discharge from Prussian nationality. In 1896 he came to England, but was never naturalised ; nor did he ever obtain the nationality of any German state, nor was it suggested that he had acquired any other nationality. He was interned during the war, and in 1918 was deported to Holland and returned to Germany. The Treaty of Peace, and the Treaty of Peace Order, together provided that the property of German nationals was charged with various payments. The plaintiff contended and proved that he had completely divested himself of Prussian nationality for all purposes, and consequently of his imperial German nationality. He contended that he was a stateless person and not within the treaty.

The defendant argued that the law of England did not admit of a condition of statelessness, and inasmuch as the plaintiff was not an English national, he must be a German national.

Russell, J., held : that there was no direct authority in English law upon the point, as the division into subjects and aliens was sufficient for the ordinary purposes of the common law, and the stateless person would be one of the aliens ; but, having regard to the British Nationality and Status of Aliens Act, 1914, which expressly enables a subject to make a declaration of alienage, whereby he ceases to be a subject, he held the condition of a stateless person is a condition recognised by the municipal law of this

country, and the plaintiff was entitled to the declaration he sought.

NATURALISATION IN AN ENEMY STATE IN TIME OF WAR

CIII. *The King* v. *Lynch*

1903 **[1903] 1 K.B. 444**

This was a trial at Bar for high treason.

The prisoner was a British subject; upon the 18th of January, 1900, when war was raging in South Africa, he became a naturalised burgher of the South African Republic, and joined the Boer army. The indictment charged the prisoner with adhering to the Government of the South African Republic, and alleged some fifteen overt acts of treason, including deliberate acts of warfare against the forces of the Crown.

It was not disputed on behalf of the prisoner that, apart from the Naturalisation Act of 1870, the alleged naturalisation in the enemy state would afford no defence. But the prisoner relied on S. 6 of the Act which provided that: "any British subject who has at any time before or who may at any time after the passing of this Act, when in a foreign state and not under any disability, voluntarily become naturalised in such state, shall from and after the time of his so having become naturalised in such foreign state, be deemed to have ceased to be a British subject, and be regarded as an alien." It was contended that this provision entitled a British subject to become an alien and throw off his allegiance to the Crown even in time of war.

HELD: by Lord Alverstone, C.J., Wills, J., and Channel, J., that the Naturalisation Act does not empower a British subject to become naturalised in an enemy state in time of war; and that the act of becoming naturalised in such circumstances is itself an act of treason, and ineffectual to afford protection against an indictment for treason in subsequently joining the military forces of the enemy.

Judgment for the Crown.

RENUNCIATION OF BRITISH NATIONALITY IN TIME OF WAR

CIV. *Gschwind* v. *Huntingdon*

1918 **[1918] 2 K.B. 420**

Case stated by the stipendiary magistrate for Manchester.

On March 8th, 1918, a complaint was preferred by the respondent against the appellant for failing, on January 29th, 1918, to report for service in the army.

The appellant was born in 1892 in Manchester; his parents being natural born Swiss subjects, he acquired from his birth a right to the citizenship of his father. The appellant served in the Swiss army. In 1914 he obtained leave of absence from the Swiss army, and returned to England, from which time he was ordinarily resident in Great Britain. He registered himself as an alien, and on April 4th, 1917, made a declaration of alienage under S. 14, Subsection 1 of the British Nationality and Status of Aliens Act, 1914. This section provides that, where "any person by reason of his having been born within

His Majesty's dominions and allegiance is a natural born British subject, but who at his birth became under the law of any foreign state a subject also of that state, and is still such a subject, may, if of full age and not under any disability, make a declaration of alienage and on making the declaration shall cease to be a British subject."

The appellant was served with a notice calling him up for service in the British army from November, 1917, but he failed to report for service. The magistrate held that when the Military Act came into operation the appellant was a British subject, and liable to military service, and he convicted the appellant. The appellant contended that he was a Swiss subject, and was therefore outside the scope of the Military Service Act, 1916. He had adopted Swiss nationality and divested himself of British nationality.

HELD: that a person who was a British subject and was also possessed of another nationality at the date when he came within the operation of the Military Service Acts, 1916, cannot by making a declaration of alienage under the Naturalisation Act, 1914, after the date when he came within the operation of those Acts, take himself out of their operation, whether such declaration has or has not been duly registered, and whether the other nationality thereby adopted by the declarant is the nationality of an enemy, an allied, or a neutral state.

Appeal dismissed.

PART IV
THE EMPIRE

X

THE RELATION OF THE CROWN AND PARLIAMENT TO THE EMPIRE

The British possessions beyond the seas are bound to Great Britain and each other in two ways, by the legislative tie of the Imperial Parliament, and secondly, by the executive and judicial tie of the Crown.

The absolute sovereignty of the Imperial Parliament extends to every part of the Empire, embracing the self-governing dominions as well as all other British possessions. This power to make and change laws over the whole breadth of the Empire, and to vary the constitution of the self-governing dominions, is rarely exercised, this sovereign body, as all sovereign bodies, has had to limit, except in exceptional circumstances, the area of its operations to matters within its immediate control. It is impossible for a Parliament sitting in England to regulate the traffic of Melbourne as it can and does that of London, and to exert its influence equally over the whole of a large empire. The supremacy of Parliament, therefore, which is theoretically unbounded, is in practice for most purposes limited to Great Britain.

The local affairs of the Empire are left wherever possible to local control, and only in matters of imperial concern does the Imperial Parliament function. Thus the self-governing dominions manage their own affairs. Their constitutions for the most part originate and depend on statutes of the Imperial Parliament, but within the limits and subject to the areas therein prescribed, their local legislatures are supreme and have the same powers as the Imperial Parliament.[1] They are not delegated authorities, and it is within their discretion by what means and in what manner they shall carry out the duties entrusted to them.

The executive power in all the British possessions is vested by the common law and statute in the Crown and its servants. The local government and the administration of justice are carried on there, as here, in the King's name. The armies of the dominions are as much the forces of the Crown as those stationed in England.[2]

Throughout the Empire the King enjoys the same prerogative rights as he has in England,[3] in so far as they have not been limited or destroyed by an Act of the local or imperial legislature.[4] In addition the Crown still exercises there prerogatives which are not now used in England, such as the right to veto legislation.

In some degree the power of the Crown is more extensive in the Empire than in England, in that in

[1] Powell *v.* The Apollo Candle Company, Ltd., CV.

[2] William *v.* Howarth, CVI.

[3] The Liquidators of the Maritime Bank of Canada *v.* The Receiver-General of New Brunswick, CVII.

[4] Gould *v.* Stewart, LVII.

certain circumstances the Crown has power to legislate for overseas possessions by Royal Proclamation.

Colonies can be grouped in two classes. Those which have been acquired by settlement and those which have been acquired by conquest. With regard to the former, the Crown possesses at common law no legislative powers. It has long been decided that an Englishman carries with him so much of the law of England as is applicable to his new circumstances. It follows that such laws can only be altered or added to by a representative legislature of the colony or by the Imperial Parliament. However the British Settlements Act, 1887, gives the Crown power to legislate by Order in Council for certain of such settlements.

In the case of conquered colonies the Crown has a common law prerogative to legislate for them by Orders in Council ; [1] but this power is lost when representative legislative institutions have once been granted to the colony.[2] Until the Crown or Parliament effects some change the old laws of a conquered colony remain in force, unless they are contrary to the fundamental principles of English law.[3] The Crown is not, however, legally responsible for the obligations of the sovereign it succeeds.[4]

The prerogative of the Crown to hear appeals from the Courts of the overseas possessions is undoubted. This right of the subject to appeal to the King in Council also rests on a statutory basis. The Judicial Committee Act, 1844, provides that

[1] Campbell *v.* Hall, CVIII. [2] *In re* The Lord Bishop of Natal, CIX.

[3] *In re* Henry Adam, CX.

[4] Cook and Another *v.* Sir James Sprigg, CXI.

appeals may be admitted from any Court of a colony. The result of this Act is that the Crown's right to hear appeals cannot be taken away except by an imperial statute.

Appeals to the Judicial Committee of the Privy Council are of two kinds, appeals of right and appeals which only take place by special leave. Appeals of right take place automatically, but special leave is required in all criminal cases, and those civil cases which do not fall within the rules laid down for appeals of right. Except in the case of Australia, the Union of South Africa, and the Irish Free State, where the right of appeal has been slightly limited, the right of appeal to the Privy Council is unfettered.[1]

A COLONIAL LEGISLATURE IS NOT A DELEGATE OF THE IMPERIAL PARLIAMENT

CV. *Powell* v. *The Apollo Candle Company, Limited*

1885 **10 A.C. 282**

This was an appeal from a decision of the Supreme Court of New South Wales. The action was brought to recover from the appellant the sum of £92, which the appellant, a collector of customs, had demanded as a duty leviable by law. The respondent contended that the duty was invalid, on the ground that the regulation under which the tax was imposed was not within the powers of the local legislature. The colonial Court held the tax to be *ultra vires*.

HELD: that the statute imposing the tax was *intra vires* the powers of the colonial legislature, and

[1] Arnold *v.* The King Emperor, CXII.

that the colonial legislature was not a delegate of the imperial legislature, but a legislature restricted in the area of its powers but within that area unrestricted, and not acting as an agent or a delegate. The imperial statute creating the Legislative Assembly of New South Wales gave it full powers to make laws for the colony, which powers were not in any sense to be exercised in delegation from, or as agents of, the Imperial Parliament ; but the statute bestowed powers as plenary and as ample, within the limits of the statute, as the Imperial Parliament in the plenitude of its power could bestow. Within these limits of subjects and areas the local legislature was supreme and had the same authority as the Imperial Parliament.

Appeal allowed.

THE CROWN AND THE ARMIES OF THE DOMINIONS

CVI. *Williams* v. *Howarth*

1905 **[1905] A.C. 551**

This was an appeal from an order of the Supreme Court of New South Wales. The respondent, a member of the New South Wales contingent which served in South Africa, sued the appellant, as nominal defendant on behalf of the Crown or the Government of New South Wales, to recover the balance of pay due to him.

The Colonial Government had agreed to pay the respondent 10s. a day, in consideration of his serving in South Africa. The Imperial Government paid the respondent 4s. 6d. a day, and the Colonial Gov-

ernment contended that this payment was made on its account and was part of the 10s. a day, and consequently only paid 5s. 6d. a day to the respondent. This the respondent denied, and claimed the full 10s. from the appellant. At the trial a verdict was entered for the balance claimed, on the ground that there was no evidence that the Imperial Government purported to pay on behalf of the local Government.

The Government of New South Wales appealed.

HELD: that the respondent was in the service of the Crown, and his payment was to be made by the Crown. Whether the money was to be found by the colony or the mother country was not a matter which could in any way affect his relation to his employer the Crown. The Government in relation to this contract was the King himself. The soldier was his soldier, and the supplies granted to His Majesty for the purpose of paying his soldiers, whether they were granted by the imperial or the colonial legislature, were moneys granted to the King; and the Appropriation Act, whenever an Appropriation Act is passed, simply operates to prevent it being applied to any other purpose.

Under these circumstances the money paid, was money paid for the services rendered to the King, and no other payment could possibly be due upon the contract.

Appeal allowed.

CVII. *The Liquidators of the Maritime Bank of Canada* v. *The Receiver-General of New Brunswick.*

1892 [1892] A.C. 437

This was an appeal from a judgment of the Supreme Court of Canada.

The Maritime Bank of Canada carried on business in New Brunswick, and, when it stopped payment in 1887, the provincial government was a simple contract creditor of the bank for the sum of $35,000, being public moneys of the province deposited in the name of the Receiver-General. The question to be decided was whether the provincial government was entitled, by virtue of the prerogative, to be paid in full before the other depositors and simple contract creditors of the bank. The Canadian Courts were of opinion that it was.

The appellants alleged that since the British North America Act, 1867, the direct relation between the Crown and the provinces had been severed, and the prerogative rights of the Crown were concentrated in the hands of the dominion government alone.

HELD: that the prerogative of the Queen, when it had not been expressly limited by local law or statute, was as extensive in Her Majesty's colonial possessions as in Great Britain.

The British North America Act did not subordinate provincial governments to a central authority, but it created a federal government, in which each province retained its independence and autonomy. The relation which existed between the Crown and the provinces was the same as that between the

Crown and the dominion in respect of the powers, executive and legislative, which were vested in the provinces.

In particular all property and revenues reserved to the provinces vested in Her Majesty as the sovereign head of each province.

Judgment appealed from affirmed.

THE CROWN'S POWER TO LEGISLATE BY ORDER IN COUNCIL FOR CONQUERED COLONIES

CVIII. *Campbell* v. *Hall*

1774 **20 St. Tr. 239**

This was an action to recover duty paid upon goods exported from the island of Grenada. The plaintiff was the owner of a plantation in the island, and the defendant, as the local collector of taxes, had levied the duty, the legality of which the plaintiff disputed.

In 1762 Grenada had been captured from the French, and in the peace of the following year the capitulation of the island was recognised by the King of France. On the 7th of October, 1763, by letters patent under the Great Seal, the Crown declared that for the protection of the rights of the inhabitants of Grenada the Governor of the island should call a general assembly, which, with the Council, should make laws for the welfare, peace, and good government of the island.

On the 14th December, 1764, before any assembly had met, the Crown by letters patent had imposed a duty of four and a half per cent. upon all goods exported from the island.

The question before the Court was whether these letters patent validly imposed this duty.

It was contended for the plaintiff that the letters were void upon two points : firstly, even if they had been made before the letters patent of 1763, the Crown had no such legislative power over a conquered country ; and secondly, even if the King had such power, yet, by the letters patent of October, 1763, he had divested himself of the power.

The judgment of the Court was delivered by Lord Mansfield, C.J., who said :

> " A country conquered by the British arms becomes a dominion of the King in right of his Crown, and therefore necessarily subject to the legislative power of the Parliament of Great Britain.
>
> " The conquered inhabitants once received into the conquerors' protection become subjects ; and are universally to be considered in that light and not as enemies or aliens.
>
> " Laws of a conquered country continue until they are altered by the conqueror.
>
> " If the King has power [and when I say the King, I mean the King without the ' concurrence of Parliament '] to make new laws for a conquered country, this being a power subordinate to his own authority, as a part of the supreme legislature in Parliament, he can make none which are contrary to fundamental principles. None excepting the laws of trade or authority of Parliament or privileges exclusive of his other subjects.
>
> " Taking these propositions to be granted, the only question on the first point is whether, between the date of the treaty of peace of 1763 and the 7th October, 1763, the King had power to make the proclamation in question.
>
> " From the history of conquests made by the Crown of England it cannot be disputed that the King may change

all or part of the political form of government over a conquered dominion. He has a legislative power over a conquered country, limited to him by the constitution and subordinate to the constitution of Parliament. . . .

" But upon the second point we are of opinion that before 1764 the King had precluded himself from an exercise of the legislative authority by virtue of his prerogative. . . .

" We think that by the proclamation of the 7th October, 1763, the King had immediately and irrevocably granted to all who did or should inhabit the island of Grenada, or who had property in the island, that the subordinate legislation over the island should be exercised by the assembly with the governor and council in like manner as other provinces under the King.

" And therefore the right of the King to have levied taxes on a conquered state subject to him in right of his Crown was good, yet by the inadvertence of the King's servants in the order in which the various instruments were made, the order is inverted, and the last we think contrary to and a violation of the first, and therefore void.

" How proper soever this thing may be respecting the object of these letters patent, it can only now be done by an Act of the Assembly of the island or by the Parliament of Great Britain."

Judgment for the plaintiff.

CIX. *In Re The Lord Bishop of Natal*

1864 **3 Moo. P.C.C. N.S. 115**

The Queen in exercise of her authority as sovereign and head of the Established Church, created by letters patent a Metropolitan and two suffragan Bishops with Episcopal jurisdiction and authority in the colony of the Cape of Good Hope, which colony at the time had a Legislative Council and House of

Assembly. By the letters patent the suffragan Bishops were declared subject and subordinate to the Metropolitan, in the same way as a Bishop of any See within the province of Canterbury was under the authority of the Archbishop ; with a right of appeal from any sentence pronounced by the Metropolitan, to the Archbishop of Canterbury. These letters patent were not made in pursuance of any Order in Council, or of a statute of the Imperial Parliament, nor were they confirmed by an act of the Legislature of the Cape of Good Hope.

In 1863 the suffragan Bishop of Natal, who had been consecrated under these letters patent, was charged with heresy. The charge was heard before his Metropolitan, who sentenced the Bishop of Natal to be deposed from his office, and to be prohibited from the exercise of any divine office within any part of the Metropolitan Province of the colony.

The Bishop of Natal petitioned Her Majesty in Council on the ground that : firstly, the letters patent creating the Metropolitan See and Province were invalid and bad in law ; secondly, the grant of coercive authority to the Metropolitan was invalid and bad in law ; and thirdly, that the sentences pronounced against him were null and void.

Held : firstly, that after the establishment of an independent legislature in the Cape of Good Hope and Natal, there was no power in the Crown by virtue of its prerogative to establish a Metropolitan See or Province, or to create an ecclesiastical corporation whose status, rights and authority the colony could be required to recognise.

After a colony or settlement has received legislative institutions, the Crown (subject to the provisions of any Act of Parliament) stands in the same relation to that colony as it does to the United Kingdom.

Secondly, the Crown had no power to confer any jurisdiction or coercive legal authority upon the Metropolitan over the suffragan Bishops, or over any other persons.

It is a settled principle of constitutional law that the Crown may by its prerogative establish Courts to proceed according to the common law, yet it cannot create any new Court to administer any other law; and it is laid down by Lord Coke that the creation of a new Court with a new jurisdiction cannot be without an Act of Parliament.

It cannot be said that any ecclesiastical tribunal or jurisdiction is required in any colony where there is no Established Church, and in the case of a settled colony the ecclesiastical law cannot, for the same reason, be treated as part of the law which the settlers carried with them from the mother country.

Appeal allowed.

THE OLD LAW REMAINS IN FORCE IN CONQUERED COLONIES

CX. *In Re Henry Adam*

1837 **1 Moo. P.C.C. 460**

This case came to be heard before the Privy Council upon a petition of complaint presented to His Majesty in Council by Henry Adam, late of the island of Mauritius.

Adam was a native of France, and had in 1817

gone over to the Mauritius with the intention of permanently settling there. He bought large estates in the island, was the head of a large business, and was highly thought of in the island. In 1833, by order of the Governor and Colonial Council, he was ordered to leave the island. Adam having obeyed this mandate, preferred a complaint to His Majesty.

Two questions were referred to the Judicial Committee :

1. What was the status of H. Adam ?

2. Whether the legal rights incidental to such status had been infringed by his removal from the Mauritius ?

It was not contended that the removal could be justified on the grounds of any offence whatsoever having been committed by H. Adam ; the law officers of the Crown relied solely upon the inherent power of the Governor and Council, as the depositories of the executive authority, to remove at pleasure all aliens not protected by any special privilege.

HELD : that H. Adam's status as an alien was clearly established, and that his rights and liabilities incidental to such status must be determined by the law of the colony. Mauritius surrendered to Great Britain in 1810, on the condition that the inhabitants should preserve their religion, laws and customs, and so the laws of France before 1810 governed the case. By that law all foreigners who entered the country without the formal and written authority of the Government (which Adam did not possess) were liable, though actually domiciled there under the tacit sanction of the Government, to be ordered to quit the country at any moment, without any excuse

being assigned for their removal. Therefore their lordships were of opinion that in ordering Adam to leave the country his legal rights incidental to his status had not been infringed.

THE LIABILITIES OF THE CROWN IN CONQUERED COLONIES

CXI. *Cook and Another* v. *Sir James Gordon Sprigg*

1899 **[1899] A.C. 572**

This was an appeal from a judgment of the Supreme Court of the colony of the Cape of Good Hope. The action was brought against the Prime Minister of the colony in his official capacity, under a local Act which permitted such an action to be brought. The plaintiffs' case was that certain concessions had been granted them by Sigcau, described as the Paramount Chief of Pondoland. In 1894 Pondoland was annexed to Cape Colony, and the plaintiffs claimed a declaration that they were entitled to these concessions and damages for interference with their rights. The Supreme Court held that the plaintiffs were not entitled to the declaration that they sought.

HELD on appeal: that the taking possession by Her Majesty, whether by cession or by any other means by which sovereignty can be acquired, was an act of State; and—treating Sigcau as an independent sovereign—it was a well established principle of law that the transactions of independent states, between each other, are governed by other laws than those which municipal courts administer.

It was no answer to say that by the ordinary prin-

ciples of international law, private property is respected by the sovereign, who accepts the cessions and assumes the duties and legal obligations of the former sovereign with respect to such private property within the ceded territory. All that can be meant by such a proposition is that according to well understood rules of international law, a change of sovereignty by cession ought not to affect private property ; but no municipal tribunal has authority to enforce such an obligation. And if there is either an express or a well understood bargain, between the ceding potentate and the government to which the cession is made, that private property shall be respected, that is only a bargain which can be enforced by sovereign against sovereign in the ordinary course of diplomatic pressure. In this case it cannot be said that there was any bargain by the British Government that Sigcau's supposed concessions should be recognised.

Appeal dismissed.

THE RIGHT OF APPEAL TO THE PRIVY COUNCIL

CXII. *Arnold* v. *The King-Emperor*

1914 **[1914] A.C. 644**

This was an appeal to the Judicial Committee of the Privy Council from a conviction and sentence of the Chief Court of Lower Burmah.

The appellant was the editor of a Rangoon paper in which an article had appeared defamatory of a member of the Indian Civil Service. The appellant was tried before the chief judge and a jury. The

jury returned a verdict of guilty, and the appellant was sentenced to one year's imprisonment. The appellant appealed on the ground that the jury had been misdirected and evidence wrongly excluded.

HELD: that the power of His Majesty by virtue of his prerogative to reverse the decisions of all Colonial Courts, whether the proceedings were of a civil or criminal character, unless His Majesty had parted with this power by statute, was undoubted. But the inconvenience of entertaining such appeals in cases of a strictly criminal nature were so great, that the Judicial Committee will not interfere with the course of criminal justice, unless there has been such an interference with the elementary rights of an accused as has placed him outside of the pale of regular law; or unless within that pale, there has been a violation of the natural principles of justice so demonstratively manifest as to convince their lordships, first, that the results arrived at were opposite to the result which their lordships would themselves have reached, and secondly, that the same opposite result would have been reached by the local tribunal also if the alleged defect or misdirection had been avoided. Only where justice in its very foundations has been subverted, and it is a matter of general imperial concern that by way of an appeal to the King, it be restored to its rightful position in that part of the Empire, will the Board advise the interposition of His Majesty the King with the course of criminal justice in the colonies or dependencies.

Appeal dismissed.

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